Supreme Court, U.S.
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No. ____ OFFICE OF THE CLERK

In The
Supreme Court of the United States

October Term, 1996

RELIABLE BUSINESS COMPUTERS,
Petitioner,

v.

THERESA A. HEURTEBISE,
Respondent.

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ON PETITION FOR A WRIT OF CERTIORARI
TO THE MICHIGAN SUPREME COURT

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TO THE MICHIGAN SUPREME COURT

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QUESTIONS PRESENTED

I.

WHETHER THE MICHIGAN SUPREME COURT'S DECISION IN *HEURTEBISE* v *RELIABLE BUSINESS COMPUTERS, INC*, SUPREME COURT NO. 102109 (RELEASED ON JUNE 16, 1996 AND REHEARING DENIED BY ORDER DATED SEPTEMBER 16, 1996) (THE "*HEURTEBISE* DECISION"), SHOULD BE VACATED BECAUSE IT IS STATE DECISIONAL LAW WHICH IS CONFLICT PRE-EMPTED BY THE FEDERAL ARBITRATION ACT ("FAA"), 9 USC § 1 *ET SEQ.*, UNDER THE SUPREMACY CLAUSE OF THE UNITED STATES CONSTITUTION, WHERE THAT COURT'S HOLDING WAS INCONSISTENT WITH THE NATIONAL POLICIES FAVORING THE ENFORCEMENT OF ARBITRATION AGREEMENTS EVEN AS TO CIVIL RIGHTS CLAIMS, AS EMBODIED IN THE FAA AND IN FEDERAL DECISIONS RECOGNIZING THE QUASI-JUDICIAL CHARACTER OF THE ARBITRAL/ADR FORUM AND HOLDING THAT SUCH ARBITRATION/ADR AGREEMENTS WAIVE NO SUBSTANTIVE RIGHTS?

II.

WHETHER THE MICHIGAN SUPREME COURT'S *HEURTEBISE* DECISION REFUSING TO ENFORCE THE ARBITRATION AGREEMENT OF THE PARTIES SHOULD BE VACATED BECAUSE IT HOLDS FORMATION OF AN ARBITRATION AGREEMENT TO DIFFERENT AND HIGHER STANDARDS THAN EMPLOYMENT CONTRACT FORMATION GENERALLY UNDER MICHIGAN LAW?

III.

WHETHER THE MICHIGAN SUPREME COURT'S *HEURTEBISE* DECISION REFUSING TO ENFORCE THE PARTIES' ARBITRATION AGREEMENT SHOULD BE VACATED ON FEDERAL CONSTITUTIONAL GROUNDS BECAUSE IT IMPAIRS THE CONTRACT ENTERED INTO BY THE PARTIES, U.S. CONST., ART. I, § 10, AND/OR BECAUSE IT DISCRIMINATES AGAINST EMPLOYERS IN THE FORMATION OF EMPLOYMENT AGREEMENTS IN VIOLATION OF THE EQUAL PROTECTION CLAUSE OF THE FEDERAL CONSTITUTION, U.S. CONST., AMD. XIV, § 1?

LIST OF PARTIES

Petitioner is Reliable Business Computers, Inc., a corporation with no parent company or wholly owned subsidiaries.

Respondent is an individual, Theresa A. Heurtebise.

TABLE OF CONTENTS

PAGE

QUESTIONS PRESENTED i

LIST OF PARTIES ii

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 1

STATEMENT OF THE CASE:

A. Violation Of Law And Rules Below 1

B. Arbitration Agreement Below 3

C. Decisions Below 4

D. Contract Impairment And Uncertainty 6

SUMMARY OF REASONS FOR GRANTING THE WRIT 7

REASONS FOR GRANTING THE WRIT 9

I. UNDER THE DOCTRINE OF CONFLICT PREEMPTION THE FAA PREEMPTS MICHIGAN'S RESTRICTION ON FORMATION AND ENFORCEMENT OF ARBITRATION AGREEMENTS. 11

A. The FAA Preempts State-Imposed Judicial Proceedings. 11

B. The FAA Compels Arbitration Of Plaintiff's Claim. 15

II. THE MICHIGAN DECISION MUST BE VACATED BECAUSE IT CONTRADICTS PRINCIPLES OF ARBITRATION AGREEMENT FORMATION UNDER MICHIGAN STATUTORY LAW. 21

III. THE *HEURTEBISE* DECISION CONTRADICTS MICHIGAN COMMON-LAW PRINCIPLES OF EMPLOYMENT CONTRACT FORMATION AND MUST BE VACATED AS CONFLICT PREEMPTED. 23

PAGE

IV. THE MICHIGAN SUPREME COURT DECISION IMPAIRS CONTRACTS AND DENIES EMPLOYERS EQUAL PROTECTION. 28

CONCLUSION 30

TABLE OF AUTHORITIES

CASES:

Alford v *Dean Witter Reynolds Inc*, 939 F2d 229 (CA 5, 1991) 19

Allied-Bruce Terminix Companies, Inc v *Dobson*, 115 S Ct 834 (1995) 8, 12, 13, 16, 27, 30

Allied Structural Steel Co v *Spannaus, Minn.*, 438 US 234 (1978) 28

Batchelor v *Sears, Roebuck & Co*, 574 F Supp 1480 (ED Mich 1983) 27

Bender v *A G Edwards & Sons, Inc*, 971 F2d 698 (CA 11, 1992) 19

Benefits Communications Corp v *Klieforth*, 642 A2d 1299 (DC Cir 1994) 19

Breish v *Ring Screw Works*, 397 Mich 586; 248 NW2d 526 (1976) 25

Carlson v *Hutzel Corporation of Michigan*, 183 Mich App 508; 455 NW2d 335 (1990); lv den (1991) 24-25

Christy v *Kelly*, 198 Mich App 215; 497 NW2d 194 (1992) 22, 26

Corion Corp v *Chen*, 964 F2d 55 (CA 1, 1992) 19

Crawford v *West Jersey Health Systems*, 847 F Supp 1232 (D NJ 1994) 20

DAIIE v *Gavin*, 416 Mich 407; 331 NW2d 418 (1982) 22

PAGE

Dancu v *Coopers & Lybrand*, 778 F Supp 832 (ED Pa 1991) *aff'd*, 972 F2d 1330 (CA 3, 1992) 20

Dahlman v *Oakland University*, 172 Mich App 502; 432 NW2d 304 (1988) 25

Degaetano v *Smith Barney, Inc*, 1996 WL 4426 (S.D. N.Y. 2/5/96) 18, 19

Detroit United Railway v *Michigan*, 242 US 238 (1916) .. 28

DiCrisci v *Lyndon Guar Bank of New*, 807 F Supp 947 (WD NY 1992) 20

Didonato v *AG Edwards & Sons Inc*, 65 FEP Cases (BNA) 1207 (ND Cal 1994) 19

Doctor's Associates, Inc v *Lombardi*, 64 USLW 4370 (1996) 8, 10, 11, 30

Edwards v *ITT Financial Services*, 65 FEP Cases (BNA) 543 (ND Cal 1993) 20

EE Tripp Excavating Contractor, Inc v *Jackson County*, 60 Mich App 221, 236-237; 230 NW2d 556 (1975) 22

Ehresman v *Bultynck & Co*, 302 Mich App 350; 511 NW2d 724 (1994) 23

FJ Siller Co v *City of Hart*, 400 Mich 578; 255 NW2d 347 (1977) 25

Fletcher v *Kidder Peabody & Co*, 81 NY 2d 623, 619 NE2d 998, 601 NYS 2d 686, *cert. den.*, 114 S Ct 554, 126 L Ed 2d 455 (1993) 20

Fulghum v *United Parcel Service*, 424 Mich 89; 378 NW2d 472 (1986) 25

Gilmer v *Interstate/Johnson Lane Securities*, 500 US 20 (1991) 2, 6, 7, 10, 15, 16, 17, 19

Gordon Sel-Way v *Spence Bros*, 438 Mich 488; 475 NW2d 704 (1991) 22

PAGE

Harrison v *Salomon Bros Inc*, 156 Misc 2d 341, 593 NYS 2d 439 (1992) 20

Hull v *NCR Corp*, 826 F Supp 303 (ED Mo 1993) 20

In re Certified Question, 432 Mich 438; 443 NW2d 112 (1989) 24

Kauffman v *The Chicago Corp*, 187 Mich App 284; 466 NW2d 726 (1991), *app den*, 439 Mich 944 (1992) 14

Lockhart v *AG Edwards & Sons*, 65 FEP Cases (BNA) 5 (D Kan 1994) 19-20

Mago v *Shearson Lehman Hutton, Inc*, 956 F2d 932 (CA 9, 1992) 19

Mastrobuono v *Shearson Lehman Hutton, Inc*, 115 S Ct 1212 (1995) 8

Metropolitan Life Ins Co v *Ward*, 470 US 869 (1985) 28

Mitsubishi Motors Corp v *Soler Chrysler-Plymouth, Inc*, 473 US 614, 105 S Ct 3346, 87 L Ed 2d 444 (1985) 15

Myers v *Western Southern Life Ins Co*, 849 F2d 259 (CA 6, 1988) 26

Nazon v *Shearson Lehman Bros Inc*, 832 F Supp 1540 (SD Fla 1993) 20

Nghiem v *NEC Electronic Inc*, 25 F3d 1437 (CA 9, 1994) 17-18

Northland Ins Co v *Sny*, 98 Mich App 507; 296 NW2d 292 (1980) 21

Perry v *Thomas*, 482 US 483, 107 S Ct 2520, 96 L Ed 2d 426 (1987) 8, 10, 15, 30

Prima Paint Corp v *Flood & Conklin Manuf Co*, 338 US 395 (1967) 10-11, 30

PAGE

Prudential v *Lai*, 42 F3d 1299 (CA 9, 1994) 18, 19

Reid v *Sears, Roebuck and Co*, 790 F2d 453 (CA 6, 1986) 22, 26

Renny v *Port Huron Hospital*, 427 Mich 415; 398 NW2d 327 (1986) 24, 25, 26, 28

Riley v *State Farm Auto Ins Co*, 420 F2d 1372 (CA 6, 1970) *cert den*, 339 US 928, 90 S Ct 2245 26 L Ed 2d 795 (1971) 21

Rushton v *Meijer, Inc*, Michigan Supreme Court Docket No. 102466 6

Ryoti v *Paine, Webber*, 142 Mich App 805 (1985) 26

S+L+H SPA v *Miller-St Nazianz, Inc*, 988 F2d 1518 (CA 7, 1993) 15

Saari v *Smith Barney. Harris Upham & Co, Inc*, 968 F2d 877 (CA 9, 1992) 15, 17

Scanlon v *P&J Enterprises*, 182 Mich App 347; 451 NW2d 616 (1990) 15

Scherk v. *Alberto-Culver Co.*, 417 U.S. 506, 511 (1974) 30

Scholz v *Montgomery Ward, Inc*, 437 Mich 83; 468 NW2d 845 (1991) 22, 23, 26, 27

Scott v *Farm Family Life Insurance Co*, 827 F Supp 76 (D Mass 1993) 20

Shearson/American Express, Inc v *McMahon*, 428 US 226, 107 S Ct 2332, 96 L Ed 2d 187 (1987) 7, 15

Southland Corp v *Keating*, 465 US 1, 104 S Ct 852, 79 L Ed 2d 1 (1984) 8, 10, 12, 13, 30

Sponseller v *Kimball*, 246 Mich 255; 224 NW 359 (1929) 22, 26

Sprague v *General Motors*, 92 F3d 1425 (CA 6, 1996) 6

Toussaint v *Blue Cross and Blue Shield of Michigan*, 408 Mich 579 (1980) 24

PAGE

Vander Toorn v *City of Grand Rapids*, 132 Mich App 590; 348 NW2d 697 (1984), app den 25

Volt Information Sciences, Inc. v. *Board of Trustees of Leland Stanford Junior Univ.*, 489 US 468, 109 S.Ct. 1248, 103 L Ed 2d 488 (1989) 10, 30

Williams v *Katten, Muchin & Zavis*, 837 F Supp 1430 (ND Ill 1993) 20

Zeniuk v *RKA Inc*, 189 Mich App 33; 472 NW2d 23 (1991) 25

UNITED STATES CONSTITUTION:

Art I, § 10 28

Amd. XIV, § 1 28

STATUTES AND RULES:

9 USC § 1 ..... *passim*

9 USC § 2 ..... *passim*

MCL § 37.2101 4

MCL § 566.1 23

MCL § 600.5001 21

MCL § 600.5001(1) 22

MCL § 600.5001(2) 22, 23

MCL § 600.5035 16

MCR 2.116(G)(4) 2

MCR 2.116(H) 3

OTHER AUTHORITY:

Restatement Contracts 2d, § 30, § 50(b), § 53(2) 26-27

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OPINIONS BELOW

The opinion of the Michigan Supreme Court is to be reported at ___ Mich. ___ (1996) (Docket No. 102109) and is reproduced at pp. A-2–A-34 of the separately-bound Appendix to the Petition for a Writ of Certiorari ["App."]. The order denying petitioner Reliable Business Computer, Inc.'s ("Reliable" or the "Company") motion for rehearing is reproduced at App. p. A-1. The Court of Appeals Opinio below, reported at 207 Mich. App. 308 (1995), is reproduced at App. pp. A-35–A-37.

JURISDICTION

This petition is timely filed within 90 days of the Michigan Supreme Court's September 16, 1996 Order denying Reliable's timely filed motion for rehearing seeking to vacate the court's plenary opinion issued on June 16, 1996. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Mich. Const. 1963, Art. 1, § 14; Mich. State Fair Employment Practices Act and Elliott-Larsen Civil Rights Act; Title 9, U.S.C. §§ 1-2; U.S. Const., Art. I, § 10; and U.S. Const., Amd. XIV, § 1, are reproduced at App. pp. A-71–A-112.

STATEMENT OF THE CASE

A. Violation Of Law And Rules Below

This case arises from the refusal of the Michigan Supreme Court to enforce an agreement between an employer and employee to arbitrate their employment disputes which might result in monetary damages.

The court reached that result by singling out arbitration provisions for suspect status, requiring greater information or choice in the formation of an agreement to arbitrate than it had over the last fifteen years for the formation of any other implied-in-fact employment agreement. The court also chose to ignore the express written agreement under which Heurtebise expressly agreed to abide by present and future employer policies and procedures contained in employee handbooks, including an arbitration procedure.

The Michigan Supreme Court violated its own court rules on motion practice and failed to follow its own precedents delineating employment contract formation in its rush to invalidate an arbitration agreement compelling the arbitration of civil rights claims. Four of the seven justices refused to join in Part III of the Opinion of the Court, which claimed, disingenuously, that Reliable had not raised the issue that the arbitration provision should be enforced under clear precedents from this Court enforcing § 2 of the FAA [App. p. A-111], when in fact almost half of petitioner's principal brief on appeal addressed *Gilmer* v *Interstate/Johnson Lane Securities*, 500 US 20 (1991) and its progeny [App. pp. A-38–A-61]. The minority Opinion (Part III) also strained, again disingenuously, to articulate a purported separate and independent state ground under the state constitutional provisions recognizing civil rights and preserving jury trials in cases in which jury trials were permitted at the time of the passage of the state constitution in 1963 [App. p. A-71], even though Heurtebise never brought a gender discrimination claim under the state constitution (which did and does not recognize gender as a protected status), but instead brought a statutory claim under a civil rights statute passed a decade *after* the ratification of the state constitution [App. pp. A-86–A-110] and succeeding a civil rights statute which provided a judicial forum only to review an agency determination on the merits and which did not recognize gender as a protected status [App. pp. A-72–A-85].

Perhaps nothing demonstrates the Michigan Supreme Court's determination to vitiate the arbitration agreement of the parties more than its decision to violate its own court rules by allowing plaintiff to supplement the record for the first time before that court. Contrary to the requirements of Michigan Court Rule 2.116(G)(4), plaintiff did not submit any affidavit or any other factual evidence on the issue of whether the agreement was knowing and voluntary in opposition to the Company's dispositive motion before the trial court, which the Company supported with record evidence outside the Complaint. The Supreme Court allowed plaintiff to introduce the entire employee handbook, without an affidavit from plaintiff herself to support the allegation that she had somehow "lost" the handbook before the dispositive motion hearing — a claim made for the first

time in the Supreme Court, and not even raised in either lower court by way of an affidavit describing why a contrary record showing could not be made under Michigan Court Rule 2.116(H). As Reliable pointed out in its response to plaintiff's motion to supplement the record, plaintiff's counsel had a complete copy of the entire handbook at all times and could have supplied it before the trial, but did not.

B. Arbitration Agreement Below

In May 1989, the Company hired Heurtebise as an "at will" employee to work at its Livonia, Michigan office. Prior to beginning her employment, Heurtebise received a copy of an employee handbook containing, *inter alia*, an arbitration procedure. Although the Michigan Supreme Court relegated her express written agreement to a footnote, Heurtebise in fact signed a written acknowledgment that confirmed both her receipt of the handbook and her voluntary agreement to conform to its terms:

> "I acknowledge receipt of the Reliable Business Computers, Inc. Employee Handbook. *I agree to conform to the various procedures, rules and regulations of the company, as set forth therein, and as may be promulgated by the company in the future*, and further understand that my employment and compensation can be terminated with, or without cause, and with or without notice at any time, at the option of either me or the company. I further understand that no employee, other than the President or his designee, in a duly executed written document, has any authority to enter into any agreement for employment for any specified period of time, *or to make any arrangements contrary to or different from what is provided in this Handbook*."

[App. p. A-62; emphasis added].

The arbitration procedure in the handbook requires all employment-related and other monetary disputes coming within its scope to be arbitrated before the American Arbitration Association ("AAA") [App. pp. A-65–A-66]. The arbitration procedure also contains a limited exception permitting either party to institute a circuit court action for equitable relief for the sole purpose of preventing immediate and irreparable harm and injury [*Id.*].

After the Company terminated Heurtebise's employment for violating an express employment rule, she bypassed the arbitration agreement altogether and filed a complaint in circuit court seeking monetary damages for alleged gender discrimination in violation of the Michigan Civil Rights Act, MCL § 37.2101 *et seq.* Respondent's complaint alleged that she was disparately disciplined for the same offense than a male employee. [Complaint ¶¶ 13-15, 19]. At no time did Heurtebise request either internal review of her termination or arbitration of her monetary damage claim, as required by the handbook arbitration clause.

In response to the complaint, on or about December 19, 1991, the Company filed a motion to dismiss or alternatively to compel arbitration and stay proceedings, based on Heurtebise's express agreement to abide by any and all employer policies and procedures, including the arbitration provision in the handbook requiring her to arbitrate all money damages claims sought as a result of any employment dispute under the broad arbitration clause.

C. Decisions Below

At the hearing on Reliable's motion to compel arbitration, the trial court denied the motion from the bench on the ground that such an agreement to arbitrate civil rights claims violated public policy. The trial court also found that the provision affording a judicial forum for equitable relief rendered the arbitration provision ambiguous:

> "An ambiguity is always received in opposition to the drafter of the contract and in this particular case the Court would find that these parties did not have a meeting of the minds relative to an agreement to arbitrate issues arising out of the Elliott-Larsen Civil Rights Act and the motion will be denied."

Reliable sought and obtained interlocutory leave to appeal in the Court of Appeals, which was granted on September 18, 1992. In its brief to the Court of Appeals, Reliable raised and addressed the issue that agreements to arbitrate are enforceable under § 2 of the FAA and cited federal cases from this

Court and the federal circuit courts in support of enforcement of arbitration agreements, even as to civil rights claims.

On October 17, 1994, the Court of Appeals entered its opinion and decision reversing the trial court [App. pp. A-35–A-37]. The Court of Appeals correctly decided:

1) The Reliable arbitration procedure is not ambiguous: "The provision requiring arbitration is not ambiguous. The clause plainly states that claims for money damages must be submitted to arbitration;"

2) To be enforceable, an arbitration agreement does not have to be a separate document or separately signed by the parties;

3) Heurtebise expressly accepted the handbook's provisions which include arbitration: "The trial court appears to have denied defendant's motion in part because it found there was no 'meeting of the minds' between plaintiff and defendant which regard to the arbitration clause. The record does not support such a finding;"

4) Provisions of an employment handbook give rise to an enforceable arbitration contract: "Even were the record devoid of plaintiff's express acceptance of the handbook's provisions, it is well established under Michigan law that mutual assent to a term of employment is not required;"

5) Public policy in Michigan favors arbitration of disputes: "We find no 'public policy' prohibition against the enforcement of a valid arbitration agreement that provides for meaningful arbitration in matters involving civil rights questions;"

6) Arbitration does not result in the loss of substantive statutory rights: "Contrary to plaintiff's suggestion, arbitration of plaintiff's claims will not result in the loss of her rights under the Civil Rights Act. . . . ;" and

7) The Reliable procedure provides for meaningful arbitration of Heurtebise's statutory claims because it meets all requirements for elementary fairness.

Reliable and its amici requested that the Michigan Supreme Court affirm the Court of Appeals decision and enforce Heurtebise's express written agreement to abide by all employer policies and procedures including arbitration of money damage disputes under Michigan statutory arbitration law, under Michigan common-law employment contract principles, and as consistent with the FAA as construed in *Gilmer*, *supra*, and its progeny. Four of the justices concurred separately because they declined to join the lengthy Part III of the opinion essentially confusing forum selection with a substantive right and inexplicably failing to reach the threshold issue of whether the arbitration agreement should be enforced under the FAA. Reliable takes great issue with the cavalier statement in the minority Part III that it never raised the issue of the impact of the FAA. Almost half of its principal brief on appeal addressed the issue of whether the agreement in issue should be enforced as consistent with the FAA and federal decisions under that statute [App. pp. A-38–A-61]. Without addressing that issue, and in a manner contrary to its own prior case law or employment contract formation, the justices concluded that an at-will disclaimer and a reservation of rights clause (required for summary plan descriptions of ERISA-governed benefits under recent Sixth Circuit case law, see, *e.g.*, *Sprague* v *General Motors*, 92 F3d 1425 (CA 6, 1996)) vitiated the enforceability of any handbook provision and evinced an employer intent not to be bound by the provisions, even though Heurtebise had received compensation and benefits under and had performed under its terms.

From that decision Reliable appeals to this Court.

D. Contract Impairment And Uncertainty

In a related case which the Michigan Supreme Court held in abeyance and then remanded in light of its decision for *Heurtebise* (*Rushton* v *Meijer, Inc*, Supreme Court Docket No. 102466) a self-authenticating affidavit submitted by the employer demonstrates that employers submitting to ADR procedures may have their decisions reversed by arbitrators and must abide by that result [App. pp. A-67–A-70, Riddle Aff., ¶ 9]; that a significant number of employment disputes are resolved

by settlement agreements without trial (and without the costs and administrative time expended by bench and litigants alike in trial) [*Id.*, ¶¶ 12-13]; and that where employers have had such procedures in place, as Meijer has had for a decade, then any decision by the Michigan Supreme Court invalidating such procedures retroactively causes grave uncertainties and potential exposure for all Michigan employers who entered into settlement agreements under such procedures in good faith and raises the spectre of increased litigation [*Id.*, ¶¶ 10-13].

SUMMARY OF REASONS FOR GRANTING THE WRIT

As this Court recognized almost a decade ago, a jaundiced view of arbitration of statutory claims including civil rights claims no longer persists:

> "[W]e are well past the time when judicial suspicion of the desirability of arbitration and the competence of arbitral tribunals should inhibit enforcement of the [Arbitration] Act 'in controversies based on statutes.'" (Quoting *Mitsubishi Motors Corp* v *Soler Chrysler-Plymouth, Inc* 473 US 614, 626-27, 105 S. Ct. 3346, 3354, 87 L.Ed.2d 444 (1985)).

Shearson/American Express, Inc v *McMahon*, 482 US 220, 226, 107 S Ct 2332, 2337, 96 L Ed 2d 187 (1987). Notwithstanding the failure of a majority of justices of the Michigan Supreme Court to address the issue of whether the agreement should be enforced as consistent with the FAA, and notwithstanding the claim of three Justices of the court that this case did not "arise under" the Federal Arbitration Act, 9 U.S.C. § 2 (the "FAA"), the Company spent almost half of its principal brief discussing the clear precedent established by this Court: that a forum selection clause is enforceable as an arbitration agreement under the FAA and does not constitute a waiver of statutory or constitutional rights, even where a civil rights statute describes a judicial procedure for enforcement. *Gilmer, supra.*

Plaintiff offered *no* record evidence below to demonstrate that her express written agreement to abide by all present and

future employer policies and procedures (including an arbitration provision) was anything but knowing and voluntary.

The decision of the Michigan Supreme Court invalidating Heurtebise's agreement to abide by all employer procedures including arbitration must be preempted under the Supremacy Clause as in conflict with national policies favoring enforcement of arbitration agreements and favoring the resolution of individual statutory civil rights claims in the quasi-judicial forum of arbitration/ADR. In 1995, in *Allied-Bruce Terminix Companies, Inc* v *Dobson*, 115 S Ct 834 (1995), and *Mastrobuono* v *Shearson Lehman Hutton, Inc*, 115 S Ct 1212 (1995), as it had years earlier in *Southland Corp* v *Keating*, 465 US 1, 104 S Ct 852, 79 L Ed 2d 1 (1984) and *Perry* v *Thomas*, 482 US 483, 107 S Ct 2520, 96 L Ed 2d 426 (1987), this Court reaffirmed its earlier conclusions that state courts must apply the Federal Arbitration Act, 9 USC § 1 *et seq.* (the "FAA"), in actions involving agreements to arbitrate where there are activities "affecting commerce" between non-diverse defendants. As this Court has repeatedly held, the FAA preempts conflicting state anti-arbitration laws requiring judicial resolution of disputes. Furthermore, this Court has held that Congress did not intend federal and state courts to reach different outcomes about the validity of arbitration in similar cases.

Because the Michigan Supreme Court held an agreement to arbitration up to a higher standard of contract formation than it has for years required of employment contracts generally, its decision in *Heurtebise* v. *Reliance Business Computers, Inc.* is in direct conflict with all of the above-listed decisions of this Court, as well as its most recent pronouncement in *Doctor's Associates, Inc.* v. *Lombardi*, 64 USLW 4370, 4372 (1996):

> "Courts may not, however, invalidate arbitration agreements under state laws applicable, only to arbitration provisions. See *Allied-Bruce* 513 U.S., at __ (slip op., at 15); *Perry*, 482 U.S., at 493, n. 9. By enacting § 2, we have several times said, Congress precluded States from singling out arbitration provisions for suspect status, requiring instead that such provisions be placed 'upon the same footing as other contracts.' *Scherk* v. *Alberto-*

> *Culver Co.*, 417 U.S. 506, 511 (1974) (internal quotation marks omitted). Montana's § 27-5-114(4) directly conflicts with § 2 of the FAA because the State's law conditions the enforceability of arbitration agreements on compliance with a special notice requirement not applicable to contracts generally. The FAA thus displaces the Montana statute with respect to arbitration agreements covered by the Act. See 2 I. Macneil, R. Speidel, T.Stipanowich, & G. Shell, Federal Arbitration Law § 19.1.1, pp. 19:4-19:5 (under *Southland* and *Perry*, 'state legislation requiring greater information or choice in the making of agreements to arbitrate than in other contracts is preempted')."

The court's refusal to enforce the parties' arbitration agreement impaired Reliable's employment agreements with Heurtebise and all of its employees and discriminated against it in the formation of contracts by failing to enforce an arbitration provision arising in the same manner as provisions favorable to employees.

REASONS FOR GRANTING THE WRIT

In a state-law decision that should be vacated under the Supremacy Clause of the U.S. Constitution, given its conflict with the FAA and federal precedent, the Michigan Supreme Court refused to enforce Heurtebise's written agreement that she would abide by employer policies and procedures, including but not limited to an arbitration provision in the employee handbook, simply because she asserted an employment discrimination claim under a state statute.

As Reliable and its amici contended before the Michigan Supreme Court, Heurtebise's express written agreement to abide by all policies and procedures of the employer included the arbitration provision in the employee handbook. That provision required Heurtebise to arbitrate all money damages employment related claims, without any exclusion for civil rights claims. Reliable contended below, successfully

before the Michigan Court of Appeals but unsuccessfully before the Michigan Supreme Court, that the agreement should be enforced as consistent with the FAA, which preempts any state judicial proceeding in conflict with the national policy favoring arbitration/ADR of employment disputes. To find otherwise in a jurisdiction where the Sixth Circuit has also extended the reach of the FAA to employment discrimination disputes (employing the analysis followed by most of the federal circuits) would contravene the principle that Congress intended that, for purposes of enforcing arbitration agreements, federal and state courts would treat similar cases in a similar manner.

Under the FAA, Heurtebise's written agreement should be enforced, particularly where the employee handbook which she received when she was hired clearly spelled out that *all* employment disputes over money damages would be subject to the arbitration provision; where she is presumed by law to have read what she agreed to and to be negligent if she has failed to make any inquiry about any contents of the handbook which she did not understand; and where, after signing the written acknowledgment, plaintiff decided to become employed and continued in the Company's employ, all the while receiving benefits under the handbook, only one provision of which she sought to repudiate: the arbitration provision.

The decision of the Michigan Supreme Court singles out arbitration provisions of statutory claims as a suspect class, holds such provisions to a higher standard of contract formation that employment contracts in general, and runs contrary to the Court's own prior decisions on enforcing handbook provisions even where an employee expressly refused to abide by and/or with the provision or claimed that [s]he had not mutually assented to the provision. Such a decision violates clear precedent articulated in this Court, *Doctor's Associates, Inc* v *Lombardi, supra*; *Gilmer, supra*; *Volt Information Sciences, Inc* v *Board of Trustees of Leland Stanford Junior Univ.*, 489 US 468 (1989); *Perry* v *Thomas*, 482 US 483 (1987); *Southland Corp* v *Keating*, 465 US 1 (1984); *Prima Paint Corp* v *Flood & Conklin*

Manuf Co, 338 US 395 (1967). The FAA displaces contrary state law, whether decisional or statutory, with respect to arbitration agreements within its ambit. *Doctor's Associates*, 64 USLW at 4372. Thus, petitioner contends that the Michigan Supreme Court decision in *Heurtebise* should be vacated.

Vacating that decision, to which the state supreme court declined to give only prospective effect as requested by Reliable and its amici, will avoid the impairment of employment contracts containing arbitration provisions under which employment disputes have been or could have been arbitrated by Reliable and other employers. Vacating that decision will also avert the constitutional violation of according less than equal protection to one party's attempts, on a record devoid of fraud, duress or adhesion, to form an employment agreement to arbitrate.

I.

UNDER THE DOCTRINE OF CONFLICT PREEMPTION THE FAA PREEMPTS MICHIGAN'S RESTRICTION ON FORMATION AND ENFORCEMENT OF ARBITRATION AGREEMENTS.

Despite clear federal precedent otherwise, below and presumably in response to this petition for review, Heurtebise will proceed from the non-evident premise that she is "entitled" to a judicial proceeding as a substantive statutory right under the Michigan Civil Rights Act or as an "absolute" constitutional right.

Assuming *arguendo* that such a right to jury trial exists, such "rights" to a jury trial afforded under state law are preempted under the federal Supremacy Clause, even for statutory civil rights claims and even where arbitration/ADR is unilaterally imposed by the employer as a condition of employment. State courts must effectuate national policies under the FAA favoring arbitration of employment disputes in actions arising out of activities affecting interstate commerce.

A. The FAA Preempts State-Imposed Judicial Proceedings

This Court has affirmed that state courts must apply the FAA in state-court disputes, and that state courts may not

enforce state judicial proceedings in contravention of arbitration provisions within the ambit of the FAA. State statutes and decisional law which conflict with the purposes of the FAA by providing that arbitral/ADR proceedings cannot be substituted for judicial proceedings are thus preempted.

1.

In *Southland Corp* v *Keating*, 465 US at 11-16, this Court recognized two purposes of the FAA:

> "(1) [I]n enacting the Federal Arbitration Act, Congress intended to overcome the old common law hostility toward arbitration, and the failure of state arbitration statutes to mandate enforcement of arbitration agreements *and to foreclose state legislative attempts to undercut the enforceability of arbitration agreements*;
>
> (2) The Federal Arbitration Act achieves the federal public policy favoring arbitration of disputes by *ousting the states from jurisdiction to provide a judicial forum for the resolution of claims which parties have expressly agreed to arbitrate, so that any state statute which frustrates the purpose of the Act violates the Federal Supremacy Clause and is therefore preempted [in the application] under the doctrine of conflict preemption.*"

[Emphasis added.]

Noting that Congress intended the FAA to unseat the deep-rooted hostility of the courts towards arbitration (as a sort of territorial response by courts seeking to extend their jurisdiction), this Court again recently concluded that state anti-arbitration provisions could not survive conflict preemption under the FAA. *Allied-Bruce Terminix Companies, Inc* v *Dobson*, 115 S Ct 834, 838-839 (1995). In *Allied-Bruce*, this Court determined that a state does not remain free to apply its anti-arbitration law or policy to frustrate the national policy of enforcing agreements to arbitrate disputes arising out of activities involving (*i.e.*, "affecting") commerce. As even the concurring opinion recog-

nized, any contrary holding would foster pre-arbitration litigation over the intent of the parties, hearings which would frustrate the very purpose of the Act.[1]

While the *Allied-Bruce* Court opined that a state could protect against unfair pressure to agree to an arbitration provision through general contract law principles, it *cautioned that a state could not enforce the other terms of a contract, but then invalidate the arbitration provision:*

> "States may regulate contracts, including arbitration clauses, under general contract law principles and they may invalidate an arbitration clause 'upon such grounds as exist at law or in equity for the revocation of *any* contract.' 9 U.S.C. § 2 (emphasis added). What States may not do is decide that a contract is fair enough to enforce all its basic terms (price, service, credit), but not fair enough to enforce its arbitration clause. The Act makes any such state policy unlawful, for that kind of policy would place arbitration clauses on an unequal "footing," directly contrary to the Act's language and Congress's intent. See *Volt Information Sciences, Inc.* [v. *Board of Trustees of Leland Stanford Junior Univ.*], 489 US [468] at 474[;] 109 S.Ct. [1248] at 1253[;] [103 L Ed 2d 488] (1989)."

So, here, Heurtebise in essence retained the benefits of the terms and conditions of employment delineated in the employee handbook, but asked the Michigan Supreme Court to invalidate a single provision: the arbitration provision. As that Court was warned by Amici Curiæ American Society of Employers, American Automobile Manufacturers Association, Michigan Chamber of Commerce and Greater Detroit Chamber of Commerce, any state court decision fashioning a state policy

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1 **Interestingly, Justice O'Connor, who had dissented in the *Southland Corp* v *Keating* decision on the ground that Congress did not intend the FAA to apply in state courts, joined the result in *Allied-Bruce* and noted in her concurrence that, because of reliance upon the *Keating* holding over the last decade by parties to arbitration agreements, the case should not be overruled by the Court.**

to vitiate an arbitration provision while enforcing other terms and conditions of the employment relationship would be preempted by federal law under the doctrine of conflict preemption. Nevertheless, the state supreme court remanded the case to a judicial forum, allowing plaintiff to seek back and front pay damages based upon her previously paid level of compensation, and/or to seek reinstatement based upon the existence of an employment agreement evidenced by the handbook whose arbitration provision she seeks to avoid. In so doing, the court allowed her to enforce all aspects of her employment agreement save one.

Michigan appellate courts have also recognized that the FAA applies in state court proceedings and precludes, where it is applicable, state judicial proceedings. *Kauffman* v *The Chicago Corp*, 187 Mich App 284; 466 NW2d 726 (1991), *app den*, 439 Mich 944 (1992). In *Kauffman*, despite her agreement to submit any employment dispute to arbitration pursuant to the rules of the New York Stock Exchange, plaintiff filed a civil action alleging wrongful discharge, defamation, and breach of employment contract. The Court of Appeals held that, pursuant to the national policy favoring arbitration embodied in the FAA, plaintiff's claims must be arbitrated:

> "The Federal Arbitration, 9 USC 1-15, governs actions in both federal and state courts arising out of contracts involving interstate commerce. *Southland Corp* v *Keating*, 465 US 1; 104 S Ct 852; 79 L Ed 2d 1 (1984); *Scanlon* v *P&J Enterprises*, 182 Mich App 347; 451 NW2d 616 (1990). More specifically, disputes between a member of a national stock exchange and its employees are within the federal act is there is a binding arbitration. *Coenen* v *R W Pressprich & Co*, 453 F2d 1209 (CA 2, 1972). States courts are bound under the supremacy clause, U.S. Constitution, Article VI, at 2, to enforce the substantive provisions of the federal act. *Scanlon, supra*."

Kauffman, 187 Mich App at 288.

As enforced through the Supremacy Clause, the FAA thus prohibits state legislatures and judiciaries from mandating a judicial forum where the parties have agreed to an arbitral/ADR

forum for the resolution of disputes relating to contracts or agreements affecting interstate commerce.

2.

This Court has also held that the duty imposed upon federal and state courts under the national policy favoring arbitration of disputes "is not diminished when a party bound by an agreement raises a claim founded on statutory rights." *Shearson/American Express, Inc* v *McMahon*, 482 US at 226, 107 S Ct at 2337; *Mitsubishi Motors Corp* v *Soler Chrysler-Plymouth Inc*, 473 US 614, 626-27, 105 S Ct 3346, 3354, 87 L Ed 2d 444 (1985). So, in *Perry* v *Thomas*, 482 US at 491 (1987), the Supreme Court held that a state statute providing a judicial forum for a wage or commission claim based on the sale of securities conflicted with the purposes of the FAA and was preempted. See, *e.g.*, *S+L+H SPA* v *Miller-St Nazianz, Inc*, 988 F2d 1518 (CA 7, 1993) (holding that state Fair Dealership Law preempted insofar as it might mandate a judicial proceeding); *Saari* v *Smith Barney, Harris Upham & Co, Inc*, 968 F2d 877 (CA 9, 1992) (claim under state polygraph protection act held subject to arbitration).

The Michigan Court of Appeals has also recognized that the FAA preempts state statutory judicial proceedings where the parties have agreed to arbitrate. In *Scanlon* v *P&J Enterprises*, 182 Mich App 347, 350-351; 451 NW2d 616 (1990), the Michigan Court of Appeals correctly held that, given the preemptive force of and national policy embodied in the FAA, any claim which the parties have agreed to arbitrate, *including a statutory claim* (there under the Michigan Franchise Investment Law), is properly submitted to an arbitral forum, rather than a judicial proceeding.

B. The FAA Compels Arbitration Of Plaintiff's Claim.

Absent a legislative intent to preclude a waiver of judicial remedies for the statutory rights in issue, "discoverable in the text of the [statute], its legislative history, or an 'inherent conflict' between arbitration and the [statute's] underlying purposes," an agreement to arbitrate must be enforced under the FAA. *Gilmer*, 500 US at 26 (quoting *Mitsubishi*, 473 US at 628). Here, neither the FAA nor the Michigan Civil Rights Act contain any such express exclusion of civil rights claims from arbitra-

tion. Plaintiff's express written agreement that she "agrees to conform" to the employer's policies and procedures in the employee handbook constitutes a sufficiently enforceable agreement under the FAA.

1.

Section 2 of the FAA provides:

> "A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."

9 USC § 2.

Section 2, by its terms, contemplates agreements to submit future disputes to arbitration, such as the age discrimination dispute in *Gilmer*. There, the plaintiff had acknowledged, on a securities registration form with the New York Stock Exchange (where registration with the NYSE was required by his employment), that he would submit any controversy required to be submitted to arbitration by the NYSE Rules. One of those rules so incorporated by reference was NYSE Rule 347, requiring the arbitration of all disputes arising out of employment or the termination of employment. Like plaintiff Gilmer, plaintiff here signed an acknowledgment (on a form other than her employment application, *i.e.*, on the tear-off sheet at the back of the employee handbook) that she would abide by present and future policies and procedures of the employer, including an arbitration procedure containing a broad arbitration clause sweeping within its ambit all employment disputes relating to dismissal (reserving only the equitable powers of the circuit court consonant with the Michigan arbitration statute, see, MCL § 600.5035).

Given the broad definition of the term "involving commerce" as "affecting commerce" by this Court in *Allied-Bruce*, *supra*,

and given this Court's holding in *Gilmer* that an acknowledgment on a securities registration form constituted an agreement to arbitrate all employment disputes within Section 2 of the FAA, this Court should find that plaintiff's written acknowledgment also falls within that section.

2.

Plaintiff's written agreement that she would abide by all present and future employer policies and procedures, including the arbitration provision in the employee handbook, constitutes an enforceable agreement to arbitrate under the FAA. Even an agreement to arbitrate discrimination claims allegedly *unilaterally imposed by the employer as a condition of employment* is enforceable under the statute.

In *Gilmer*, as noted above, the Supreme Court enforced an arbitration provision in a securities registration form which the employee was required to sign as a condition of employment, for Gilmer's employment required him to become licensed by a national stock exchange. Following *Gilmer*, the Ninth Circuit rejected the argument offered by plaintiff and her amici that an employer cannot unilaterally impose, as a condition of employment or a condition precedent to employment, an agreement to submit all claims, including statutory claims, to arbitration/ADR. The *Saari* Court specifically rejected the plaintiff's argument that the judicial proceeding described in the federal Employee Polygraph Protection Act (the "EPPA") was exclusive, and held that the EPPA's express prohibition against a prospective waiver of rights *and procedures* did not render unenforceable the employer's unilateral imposition of an arbitration agreement covering all claims as a condition of employment, just as similar anti-waiver prohibitions in the federal anti-trust acts and in RICO did not preclude enforcement of agreements to resolve such claims in an arbitration, rather than a judicial proceeding. 968 F2d at 881-882.

The federal courts recognize that such agreements to arbitrate may appear in employee handbooks which employees acknowledge receiving, as in the case at bar. In *Nghiem* v *NEC Electronic Inc*, 25 F3d 1437 (CA 9, 1994), the Ninth Circuit re-

jected plaintiff's arguments that he did not knowingly and willingly submit his employment disputes to arbitration, where he acknowledged receipt of an employee handbook providing that all employment disputes would be subject to arbitration. There, plaintiff claimed that he had only invoked the arbitration procedure because the Company told him to do so. He also claimed that he had refused to sign a modification of his employment agreement because it contained a binding arbitration clause. In part because he had signed written acknowledgments of receipt of the Company handbook providing a four-step resolution process for employee complaints, the Ninth Circuit held that his employment discrimination claims under Title VII and state law were subject to arbitration. Although plaintiff's amici cite the Ninth Circuit case of *Prudential* v *Lai*, 42 F3d 1299 (CA 9, 1994), for the proposition that a pre-hire agreement to arbitrate prospective claims is not enforceable, the *Lai* case is distinguishable from the *Nghiem* case. The handbook in *Nghiem* provided for arbitration of all employment disputes in an employee handbook, as does the Company handbook here. The U-4 form and the employment contract in *Lai*, as the Ninth Circuit noted, "did not even refer to employment disputes" or cover such disputes.

Again, in *Degaetano* v *Smith Barney, Inc*, 1996 WL 4426 (S.D.N.Y. 2/5/96), plaintiff (as here) signed an agreement providing that she must observe the employer policies and procedures that the employer would from time to time establish, and she received a series of employee handbooks containing dispute resolution procedures for all employment disputes. Alleging constructive discharge due to environmental sexual harassment, plaintiff sued the employer for alleged violations of Title VII and the New York Human Rights law, and she sued the alleged harasser under the common law for intentional infliction of emotional distress. She then refused the employer's demand to submit to arbitration. As does plaintiff Heurtebise, plaintiff Degaetano claimed that she had no idea what she was signing when she signed the agreement, and that she had not therefore made a knowing and voluntary waiver of her "right" to a judicial forum. Rejecting the *Lai* Court's holdings and

noting that other courts similarly disfavored the *Lai* decision, the *Smith Barney* court distinguished *Lai* on the ground that the *Lai* agreement did not expressly reference employment disputes. Moreover, the court noted that in *Smith Barney*, as here, the agreement required plaintiff to acknowledge that she agreed to conform to the employer's policies and procedures, as described in the handbook. As the court noted, given plaintiff's signature signifying her agreement, "under ordinary state-law principles that govern the formation of contracts, . . . plaintiff's claim that she did not knowingly sign the Agreement is to no avail." *Id.* at 7-8.

In the following post-*Gilmer* non-union employee cases, the courts have dismissed lawsuits and required arbitration of a wide variety of claims, including those asserting discrimination arising under federal and/or state law: *Benefits Communications Corp* v *Klieforth*, 642 A2d 1299 (DC Cir 1994) (noting that every federal circuit court of appeals addressing the issue has extended the *Gilmer* holding to employment discrimination claims brought under Title VII); *Bender* v *AG Edwards & Sons, Inc*, 971 F2d 698 (CA 11, 1992) (holding Title VII claims subject to compulsory arbitration); *Alford* v *Dean Witter Reynolds Inc*, 939 F2d 229 (CA 5, 1991) (same); *Corion Corp* v *Chen*, 964 F2d 55 (CA 1, 1992) (leaving undisturbed the lower court holding that plaintiff was entitled, under the FAA, to arbitrate his discharge based upon company policy specified in the employee handbook); *Mago* v *Shearson Lehman Hutton Inc*, 956 F2d 932, 935 (CA 9, 1992) (holding Title VII claims held to be arbitrable even with regard to pro per plaintiff); *Didonato* v *AG Edwards & Sons Inc*, 65 FEP Cases (BNA) 1207 (ND Cal 1994) (holding that broad and inclusive arbitration clause in former employee's employment application compels dismissal of her action under Title VII and state tort law for sexual harassment, and rejecting plaintiff's contentions that she did not realize or intend that arbitration provision would require arbitration of claims for sexual harassment claims, that arbitration would deny plaintiff's constitutional right to jury trial, and that arbitration frustrates policies underlying Title VII); *Lockhart* v *AG Edwards & Sons*,

65 FEP Cases (BNA) 5, 6 (D Kan 1994) (holding Title VII claims arbitrable); *Edwards* v *ITT Financial Services*, 65 FEP Cases (BNA) 543 (ND Cal 1993) (holding that broad arbitration clause in employment agreement covering all disputes and claims between employer and employee mandates submission of race discrimination claims to arbitration); *Crawford* v *West Jersey Health Systems*, 847 F Supp 1232 (D NJ 1994) (enforcing arbitration provision as to age and sex discrimination claims brought against the company and individual defendants); *Williams* v *Katten, Muchin & Zavis*, 837 F Supp 1430 (ND Ill 1993) (holding sex discrimination claims arbitrable); *Hull* v *NCR Corp*, 826 F Supp 303 (ED Mo 1993) (holding that FAA applied that arbitration provision contained in individual employment contract was broad and to be liberally construed, that plaintiff's Title VII, ADEA ,and state law discrimination claims were to be arbitrated); *Scott* v *Farm Family Life Insurance Co*, 827 F Supp 76 (D Mass 1993) (holding federal and state sex discrimination, contract and tort claims arbitrable under the FAA); *Nazon* v *Shearson Lehman Bros Inc*, 832 F Supp 1540 (SD Fla 1993) (holding sex discrimination claims arbitrable); *Fletcher* v *Kidder Peabody & Co*, 81 NY 2d 623, 619 NE2d 998, 601 NYS 2d 686, *cert. den.*, 114 S Ct 554, 126 L Ed 2d 455 (1993) (holding race and sex discrimination claims arbitrable); *Harrison* v *Salomon Bros Inc*, 156 Misc 2d 341, 593 NYS 2d 439 (1992) (holding sex discrimination claims arbitrable); *Dancu* v *Coopers & Lybrand*, 778 F Supp 832 (ED Pa 1991), *aff'd*, 972 F2d 1330 (CA 3, 1992) (agreement to arbitrate prospective disputes enforced as to ADEA claim); *DiCrisci* v *Lyndon Guar Bank of New*, 807 F Supp 947 (WD NY 1992) (enforcing arbitration agreement as to Title VII and state law gender discrimination and sexual harassment claims where, as here, arbitration provision broadly submitted any employment dispute (including prospective disputes) to arbitration, *and even where (unlike here) arbitration provision limited remedies otherwise available under the discrimination statutes*).

Thus, under the FAA, unilaterally imposed agreements to arbitrate discrimination claims, even those entered into as a condition of employment, must be enforced.

II.

THE MICHIGAN DECISION MUST BE VACATED BECAUSE IT CONTRADICTS PRINCIPLES OF ARBITRATION AGREEMENT FORMATION UNDER MICHIGAN STATUTORY LAW.

Contrary to the decision of Michigan's highest court, enforcing plaintiff's written agreement to arbitrate would have effectuated Michigan's long-standing public policy favoring the arbitration of disputes, as codified in the Michigan Arbitration Act, MCL § 600.5001 *et seq.* (the "MAA"). The Michigan public policy in favor of arbitration reposes in an express statute providing that private arbitration agreements are valid, enforceable, and irrevocable "save upon such grounds as exist at law or in equity for the rescission or revocation of any contract," MCL § 600.5001. Michigan courts other than the *Heurtebise* court have recognized that statutory public policy and have liberally construed arbitration clauses, with all doubts resolved in favor of arbitration. *Riley* v *State Farm Auto Ins Co*, 420 F2d 1372 (CA 6, 1970), *cert den*, 339 US 928 (1971); *Northland Ins Co* v *Sny*, 98 Mich App 507; 296 NW2d 292 (1980).

The lead opinion in the *Heurtebise* decision, in which all justices joined, states that the MAA requires a binding contract [App. A-8, fn. 8], but concludes based on at-will disclaimer language and a reservation of rights to change clause that Reliable did not intend to be bound by the handbook's terms, thus negating any "contract." The *Heurtebise* court provided no analysis for its erroneous "footnote holding" that the handbook was not an enforceable contract under the MAA. The court never even addressed the issue of whether Heurtebise's signed written agreement to abide by Reliable's policies and procedures (including the arbitration provision) constituted an enforceable arbitration agreement under Michigan statutory arbitration law. Reliable again argues that the arbitration procedure at issue comports with the requirements of statutory agreements to arbitrate under the MAA,

MCL § 600.5001(2). The express written agreement is not a collectively bargained agreement falling within the exception to that Act. Moreover, the procedure provides on its face that the decision of the arbitrator is intended to be enforceable in any court of competent jurisdiction, or, at the very least, exhaustion is required as a condition precedent to the institution of any legal proceeding. Such language is sufficient to bring the arbitration agreement within the language of Michigan's arbitration statute. *Gordon Sel-Way* v *Spence Bros*, 438 Mich 488, 495; 475 NW2d 704 (1991); *DAIIE* v *Gavin*, 416 Mich 407, 417; 331 NW2d 418 (1982); *E E Tripp Excavating Contractor, Inc* v *Jackson County*, 60 Mich App 221, 236-237; 230 NW2d 556 (1975).

Nor is plaintiff's contention that she did not knowingly or voluntarily enter into any agreement to arbitrate civil rights claims persuasive, where she is presumed to have read what she has agreed to abide by under long-standing Michigan precedent. See, *e.g.*, *Scholz* v *Montgomery Ward, Inc*, 437 Mich 83, 91-92; 468 NW2d 845 (1991); *Reid* v *Sears, Roebuck and Co*, 790 F2d 453, 461-462 (CA 6, 1986); *Sponseller* v *Kimball*, 246 Mich 255, 260; 224 NW 359 (1929). Her negligence in failing to read and/or to comprehend the agreement which she signed does not excuse her from the agreement: that she "agreed to conform" to the policies and procedures of the employer as embodied in the handbook. So in *Christy* v *Kelly*, 198 Mich App 215; 497 NW2d 194 (1992), the Court of Appeals held that, under the MAA, a trustee's failure to read or to comprehend the agreement to arbitrate which he signed did not constitute a defense to the agreement.

The Michigan Supreme Court required a "contract" to arbitrate, even though the Michigan Legislature did not require in the MAA that there be a signed bilateral contract, but merely an "instrument in writing." MCL § 600.5001(1). On appeal to the Michigan Supreme Court, Heurtebise unfairly attempted to construe the MAA in a manner so that any agreement to arbitrate *prospective* disputes would require a somewhat higher quantum of proof of "contract" than an agreement to arbitrate disputes in being at the time of entry into the agree-

ment. That the Legislature apparently used the terms "arising under," "thereafter arising," and "existing" (as well as the terms "agreement" and "contract") interchangeably may be discerned from MCL § 600.5001(2). Thus, to read the word "existing" in sub-section 1 to mean "prospective," rather than "arising," does violence to the structure and intent of that sub-section, which merely recites that parties who are competent under the law may submit any dispute "arising between" them to arbitration by agreeing to do so in an "instrument in writing." Moreover, Michigan appellate courts have permitted "instruments in writing" under the MAA involving prospective claims with less than exists in the case at bar, where plaintiff at least signed her acknowledgment that she would abide by employer policies. In *Ehresman* v *Bultynck & Co*, 203 Mich App 350; 511 NW2d 724 (1994), the Michigan Court of Appeals refused to excuse from the operation of arbitration agreements a plaintiff who discovered that he had not signed the agreements and argued that the statute required a signed agreement by the party resisting arbitration.

To the extent that this Court feels that a written instrument in writing is required under the MAA, then plaintiff's written acknowledgment signifying her agreement to the procedures in the handbook constitutes a writing sufficient to withstand the Michigan Statute of Frauds, where there is no additional consideration for the agreement other than continued employment, but it has been signed by the party charged with the agreement or promise. *Scholz, supra;* MCL § 566.1.

III.

THE *HEURTEBISE* DECISION CONTRADICTS MICHIGAN COMMON-LAW PRINCIPLES OF EMPLOYMENT CONTRACT FORMATION AND MUST BE VACATED AS CONFLICT PREEMPTED.

The Michigan Supreme Court failed to apply its own prior decisions and well-settled principles of Michigan common law under which unilaterally established arbitration/ADR proce-

dures are enforced, where (as here) plaintiff simply abandoned arbitration procedures and haled the employer into court.

In *Toussaint* v *Blue Cross and Blue Shield of Michigan*, 408 Mich 579, 624; 292 NW2d 880 (1980), and again in *Renny* v *Port Huron Hospital*, 427 Mich 415; 398 NW2d 327 (1986), the Michigan Supreme Court has announced the rule that employers may avoid the perils of jury review of allegedly wrongful discharge claims by providing for binding arbitration, just as the Company has done: "Additionally, the employer can avoid the perils of jury assessment by providing for an alternative method of dispute resolution. A written agreement for a definite or indefinite term to discharge only for cause could, for example, provide for binding arbitration on the issues of cause and damages." *Id.* at 427 Mich 432.

In *Toussaint, supra*, this Court held that written handbook policies create binding rights without a "meeting of the minds," a standard from which the *Heurtebise* court departed in order to invalidate the parties' arbitration agreement:

> "We hold that employer statements of policy . . . can give rise to contractual rights in employees without evidence that the parties mutually agreed that the policy statements would create contractual rights in the employee, and, hence, can be unilaterally amended by the employer without notice to the employee . . .

408 Mich at 614-15. See also, *In re Certified Question*, 432 Mich 438; 443 NW2d 112 (1989); *Carlson* v *Hutzel Corp of Mich*, 183 Mich App 508; 455 NW2d 335 (1990), lv den 437 Mich 493 (1991).

Michigan appellate courts have also recognized that, *even where the arbitration procedure is unilaterally established*, the procedure is an aggrieved employee's sole and exclusive remedy on the merits of her or his wrongful discharge dispute with the former employer. *Carlson* v *Hutzel Corporation of Michigan*, 183 Mich App 508, 515; 455 NW2d 335 (1990), app

den (1991); *Zeniuk* v *RKA Inc*, 189 Mich App 33; 472 NW2d 23 (1991); *Dahlman* v *Oakland University*, 172 Mich App 502; 432 NW2d 304 (1988). At the very least, where the employer agrees to submit review of its decision to a neutral fact-finder other than a jury and other than the decision-maker itself, the employee should utilize that review process. *Renny, supra*; *Fulghum* v *United Parcel Service*, 424 Mich 89; 378 NW2d 472 (1986); *Carlson, supra*; *Zeniuk, supra*.

Where, as here, the parties expressly agree to submit claims to an ADR procedure which ultimately results in arbitration, utilizes AAA procedural rules, and permits the parties to present proofs and to be represented by attorneys, then the parties may not contest *ab initio* in a court the merits of their dispute. See, *e.g.*, *F J Siller Co* v *City of Hart*, 400 Mich 578; 255 NW2d 347 (1977); *Breish* v *Ring Screw Works*, 397 Mich 586, 594, n 4; 248 NW2d 526 (1976).

For almost ten years, under Michigan employment law, it was well-settled that an employee who fails to invoke and/or to exhaust an arbitration procedure unilaterally imposed by the employer is barred from litigating the merits of her or his wrongful discharge claim in civil court: the only judicial review is limited to the issue of procedural fairness. *Dahlman, supra*. In order to determine that issue, the court may, as a threshold issue and as a matter of law, determine whether the procedure comports with principles of elemental fairness and due process. In fact in *Renny*, 427 Mich at 418 *authored by the same Justice who authored the Heurtebise decision*, the Michigan Supreme Court held that "where an employee has expressly consented to submit a complaint to a joint employer-employee grievance board established by the employer with the knowledge that the resulting decision is final and binding, the decision shall be final unless *the court finds as a matter of law* that the procedures did not comport with elementary fairness." The arbitration procedure in issue here culminates in binding arbitration by a neutral third-party arbitrator. See: *Vander Toorn* v *City of Grand Rapids*, 132 Mich App 590; 348 NW2d 697 (1984) app den. In contrasting the Port Huron Hospital procedure with arbitration procedures,

the *Renny* Court necessarily impliedly held that arbitration procedures, such as the AAA procedures expressly incorporated into the ADR Procedure at issue, are presumptively fair. 427 Mich at 433-436.

Under Michigan law, even public policy tort claims must be submitted to the ADR procedure, and that Heurtebise's failure to do so bars her public policy tort claim. See, *e.g.*, *Ryoti* v *Paine, Webber*, 142 Mich App 805; 371 NW2d 454 (1985) (public policy tort claim is arbitrable). Here, Heurtebise simply asserts a statutory tort claim, and there is no principled reason for treating such tort claims any differently, for purposes of forum selection, than common-law tort claims, apart from the now disfavored view that arbitrators are incapable of remediating employment discrimination claims.

By virtue of the separate agreement signed by plaintiff to become aware of and to abide by the procedures in the employee handbook, plaintiff was reasonably informed about the arbitration policy and procedure. It is undisputed that she signed the agreement, that she received a copy of the handbook at hire and termination, and that she voiced no objection to the procedure until after her discharge. Like the plaintiff in *Myers* v *Western Southern Life Ins Co*, 849 F2d 259 (CA 6, 1988), in which the Sixth Circuit enforced a waiver of the statutory statute of limitations, plaintiff was presumed to be well-informed of the agreement. Moreover, under Michigan law she had a duty to read the agreement and the handbook and to inquire about any contents which concerned her. *Scholz*, *supra*; *Reid*, *supra*; *Sponseller*, *supra*; *Christy*, *supra*. She could not simply remain silent and then claim that she did not knowingly or voluntarily assent to the procedure, particularly where she accepted the substantial benefits under the employee handbook, and where the handbook in its very introduction invited plaintiff and all employees of the Company to ask questions about any provisions which they did not understand.

The Restatement Second of Contracts also contemplates that continued performance without protest constitutes objective indicia of assent to the term or condition in issue.

Only where the offeror (here, the employer "unilaterally imposing" an arbitration agreement) has expressly stated that acceptance will be in a particular manner is the acceptance of the offer limited to that manner. See *Restatement Contracts*, 2d, § 30, comment a. Where acceptance is invited or suggested in a particular manner, that invitation does not preclude other means of acceptance. *Id.*, comment b. Section 50(b) of the Restatement Second also clearly recognizes acceptance by performance. Moreover, where the offer is one which can be construed to permit performance as acceptance, then performance does not constitute a manifestation of assent only if, within a reasonable time, the offeree notifies the offeror of non-acceptance. *Restatement Contracts*, 2d § 53(2). The offeree who remains silent while continuing to perform as the offer contemplated risks being bound if it is reasonable to assume from his conduct that he accepts the offer. *Id.*, comment b. Here, after receiving the acknowledgment form and the handbook containing the arbitration procedure, Heurtebise continued in the employ of the Company without protest, without coming forward as she was duty-bound to do under *Scholz*, and *without refusing any benefit of employment under the handbook*. Under those circumstances, as this Court has itself cautioned, an arbitration provision in a handbook should not be held unenforceable while all of the handbook provisions which benefited plaintiff are enforced. *Allied-Bruce*, *supra*. See also: *Batchelor* v *Sears, Roebuck & Co*, 574 F Supp 1480, 1484 (ED Mich 1983) (employee bound by both benefiting and burdening provisions in same handbook). Over time, as a result of Heurtebise's ratification by conduct, as a matter of law, the privilege of silence should fall away, continued performance and receipt of substantial benefits should be deemed as an objective manifestation of assent, and plaintiff should be estopped from denying her agreement to the arbitration policy and procedure described in the handbook which she received simultaneously with her acknowledgment.

IV.

THE MICHIGAN SUPREME COURT DECISION IMPAIRS CONTRACTS AND DENIES EMPLOYERS EQUAL PROTECTION.

In according an agreement to arbitrate statutory civil rights claims suspect status by requiring greater elements of contract formation for such agreements than under its own theories of employment contract formation when such theories benefited employees, rather than employers, the Michigan Supreme Court engaged in impermissible impairment of contracts in violation of Article I, § 10 of the Federal Constitution. By holding such agreements up to stricter standards of contract formation when an employer (in *Heurtebise*), as opposed to an employee (as in *Renny, supra*), sought to enforce a handbook provision which for years the very same court had permitted to be enforced by employees with no meeting of the minds or mutual assent, the court also treated similarly situated parties, *i.e.*, employees and employers seeking to agree upon terms and conditions of employment (including but not limited to arbitration procedures), in a disparate manner in violation of the federal constitutional guarantee of equal protection contained in the first section of the Fourteenth Amendment.

Corporations like Reliable, who are employers, are also persons for purposes of enforcing certain constitutional guarantees, such as the right to enjoy the benefits of a contract without impairment and the right to equal protection under the laws. See, *e.g.*, *Metropolitan Life Ins Co* v *Ward*, 470 US 869 (1985).

Where a state, here through its highest supreme court, promulgates a law which adversely affects the enforcement of an arbitration agreement, then that state has violated the constitutional prohibition against state action which impairs contract obligations enjoyed by private citizens, including corporate citizens. *Allied Structural Steel Co* v *Spannaus, Minn.*, 438 US 234 (1978); *Detroit United Railway* v *Michigan*, 242 US 238 (1916). As discussed above, given the cavalier manner in which Michigan's highest court chose to sidestep the thresh-

old issue of enforcement of an arbitration agreement under the FAA, and given the court's willingness to contravene its own prior decisions enforcing handbook provisions without mutual assent and its willingness to ignore the employee's express written agreement to abide by all employer policies and procedures, the arbitration agreement into which Reliable entered in order to have a less costly and more expeditious means of resolving employment disputes where former employees sought money damages was substantially impaired. *Id.* The *Heurtebise* opinion effectively vitiates, not only Reliable's arbitration agreements with its employees, but also the arbitration agreements of other Michigan employers who have successfully resolved employment disputes through arbitration, particularly where the Michigan Supreme Court refused to apply its newly announced principles of arbitration agreement formation prospectively. See App. pp. A-67–A-70, Riddle aff.

Moreover, where a state treats persons essentially similar (*i.e.*, the parties to an arbitration agreement on a record devoid of any fraud or duress or adhesion) in a disparate manner, by penalizing one but not the other for seeking to enforce handbook provisions, and by permitting the enforcement of handbook provisions which benefit the employee (both on remand to a finder of fact as a measure of damages or as proof of the right to be reinstated, and during employment as a "promise" of certain compensation and benefits) but not those which arguably may benefit the employer (the arbitration provision), then the equal protection clause has been violated. The Michigan Supreme Court in effect accorded the arbitration provision of the employment agreement suspect class status, without any rational basis therefor and despite the strong national policies against doing so. In the past, without any meeting of the minds, as discussed above, the Michigan Supreme Court has enforced handbook provisions providing for compensation, benefits, and job security terms. To fail to enforce an arbitration provision in an employee handbook on the ground that there was no mutual assent or meeting of the minds subjects employers, but not

employees, to separate standards for contract formation with no rational basis for such standards.

Under these circumstances, Reliable and all other Michigan employers have been deprived of their rights to enjoy the benefits of contract and to enjoy equal protection of the laws.

CONCLUSION

For reasons discussed above, petitioner Reliable Business Computers, Inc., respectfully requests that this Court grant its petition for certiorari, vacate the decision of the Michigan Supreme Court and either a) remand this matter to that Court with instructions to reinstate and affirm the Michigan Court of Appeals decision; b) remand this matter to the Michigan Supreme Court for reconsideration on the issue of whether the parties' agreement to arbitrate should be enforced under the FAA, the MAA, and/or principles of Michigan employment law relating to employment contract formation in light of *Doctor's Associates*, *supra*, *Volt*, *supra*, *Allied-Bruce*, *supra*, *Perry*, *supra*, *Prima Paint*, *supra*, *Southland Corp*, and *Scherk* v. *Alberto-Culver Co.*, 417 U.S. 506, 511 (1974); or c) grant plenary consideration on any or all issues raised herein.

Respectfully submitted,

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Dated: December 13, 1996

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No. _____

In The
Supreme Court of the United States

October Term, 1996

RELIABLE BUSINESS COMPUTERS,
Petitioner,

v.

THERESA A. HEURTEBISE,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE MICHIGAN SUPREME COURT

APPENDIX
TO PETITION FOR A WRIT OF CERTIORARI TO THE MICHIGAN SUPREME COURT

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115 pp

TABLE OF CONTENTS OF APPENDIX

PAGE

ORDER DENYING REHEARING – State of Michigan Supreme Court (*September 16, 1996*) A-1

OPINION – State of Michigan Supreme Court (*July 16, 1996*) A-2

OPINION – State of Michigan Court of Appeals (*October 17, 1994*) A-35

EXCERPTS FROM DEFENDANT-APPELLEE'S BRIEF ON APPEAL – State of Michigan Supreme Court (*December 5, 1995*) A-38

EMPLOYEE ACKNOWLEDGMENT – Reliable Business Computers, Inc (*May 25, 1989*) A-62

EXCERPT FROM PLAINTIFF-APPELLANT'S SUPPLEMENTAL APPENDIX – State of Michigan Supreme Court A-63

AFFIDAVIT OF THOMAS RIDDLE – State of Michigan Court of Appeals (*May 6, 1993*) A-67

STATUTORY AND CONSTITUTIONAL AUTHORITIES:

Mich. Const. 1963, Art. 1, § 14 ..... A-71

Michigan Fair Employment Practices Act A-72

Elliott-Larsen Civil Rights Act A-86

Title 9, United States Code, §§ 1-2 ..... A-111

U.S. Const., Art. I, § 10 ..... A-112

U.S. Const., Am. XIV, § 1 ..... A-112

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ORDER DENYING REHEARING

(State of Michigan — Supreme Court)

(Entered September 16, 1996)

(THERESA S. HEURTEBISE, Plaintiff-Appellant, v RELIABLE BUSINESS COMPUTERS, INC., Defendant-Appellee — SC: 102019; CoA: 152041; LC: 91-131165-CZ; Rehearing N1.366)

James H. Brickley, Chief Justice; Charles L. Levin, Michael F. Cavanagh, Patricia J. Boyle, Dorothy Comstock Riley, Conrad L. Mallett, Jr., Elizabeth A. Weaver, Justices.

In this cause, a motion for rehearing is considered, and it is hereby DENIED.

(SEAL)

(Certification Omitted)

OPINION

(State of Michigan — Supreme Court)

(Argued April 10, 1996 [Calendar No. 5];
Decided & Filed July 16, 1996)

(THERESA S. HEURTEBISE, Plaintiff-Appellant, v RELIABLE BUSINESS COMPUTERS, INC., a Michigan corporation, Defendant-Appellee — No. 102019)

James H. Brickley, Chief Justice; Charles L. Levin, Michael F. Cavanagh, Patricia J. Boyle, Dorothy Comstock Riley, Conrad L. Mallett, Jr., Elizabeth A. Weaver, Justices.

BEFORE THE ENTIRE BENCH

CAVANAGH, J.

We are asked in this case to address whether the instant parties have created a binding arbitration agreement with respect to employment discrimination claims accruing subsequent to such an agreement. If yes, then we would need to address whether such agreements between employers and employees, entered into as a condition of employment, violate public policy in Michigan. We hold that no binding agreement was created in this case. Consequently, a majority of this Court declines to address the second issue. However, I would further hold that the public policy against discrimination in Michigan precludes enforcement of prospective waivers in employment contracts of a judicial forum for civil rights claims. Before turning to the matter at hand, we thank all of the amici curiae who filed briefs for assisting us in resolving the issues.

I

This case is at the summary disposition stage. In November 1991, the plaintiff, Theresa Heurtebise, filed suit against the defendant, Reliable Business Computers, alleging that she had been unlawfully terminated from

her employment in violation of the Michigan Civil Rights Act. MCL 37.2101 *et seq.*; MSA 3.548(101) *et seq.* The plaintiff alleged that she had been hired in May 1989 to perform computer software support work. She further alleged that she and a co-worker, who was male, often took lunches that lasted longer than the company's established one-hour period, while working together on a project. Additionally, she alleged that on July 20, 1990, the plaintiff and this male co-worker returned from a working lunch that had lasted longer than one hour. The plaintiff alleged that she was terminated, while her male co-worker was not. The plaintiff argued that this was unlawful gender discrimination and sought money damages.

In response, the defendant brought a motion to dismiss, pursuant to MCR 2.116(C)(4) (lack of subject matter jurisdiction), or, alternatively, to compel arbitration and to stay proceedings, pursuant to MCR 3.602. The defendant relied on a written acknowledgment signed by the plaintiff and dated May 25, 1989, which stated that she had received the defendant's employee handbook and that she had agreed to be bound by its terms and policies.[1] The handbook provided an internal review mechanism for disputes with respect to dis-

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1 **The document provided:**

> **I acknowledge receipt of the Reliable Business Computers, Inc. Employee Handbook. I agree to conform to the various procedures, rules and regulations of the company, as set forth therein, and as may be promulgated by the company in the future, and further understand that my employment and compensation can be terminated with, or without cause, and with or without notice at any time, at the option of either me or the company. I further understand that no employee, other than the president or his designee, in a duly executed written document, has any authority to enter into any agreement for employment for any specified period of time, or to make any arrangements contrary to or different from what is provided in this handbook.**

missals.[2] In addition, it provided that all disputes involving money damages would go to final and binding arbitration.[3]

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2 Notwithstanding that employees are employed by the COMPANY "at will" and that an employee's employment may be terminated by the employee or the COMPANY, at any time, (without notice and without cause). An employee who has followed the internal review procedure for review by the Executive Committee, (specified above), and who is not satisfied with the results of the review and who feels compelled to seek redress from a source outside the COMPANY may challenge the propriety of the dismissal outside the COMPANY, only through arbitration as hereinafter described.

Such arbitration shall be the final arena of dispute resolution and the decision of the arbitrator(s) shall be final and binding upon both the COMPANY and the employee.

3 Section VIII of the handbook provided:

ARBITRATION OF DISPUTES

If any dispute, matter or controversy involving claims of monetary damages and/or employment related matters should arise between an employee and the COMPANY, including, but not limited to, any and all claims relating to termination of employment (regardless of whether or not the employee has exhausted the various mandatory procedures for internal review of complaints and dismissals), then such dispute, matter or controversy shall be referred for binding arbitration under the laws of the State of Michigan to the American Arbitration Association (hereinafter "AAA") under the rules of such AAA, to be decided by a three (3) member arbitration panel, except that the COMPANY shall have the right to select one arbitrator, the employee shall have the right to select one arbitrator, and the two arbitrators so selected shall select a third arbitrator. A decision or award of the AAA shall be accepted as final and conclusive and shall be binding upon both the employee and the COMPANY . . . . The arbitration proceeding shall afford the COMPANY and the employee with opportunities to present and rebut evidence relative to the applicable issues. Nothing herein relative to arbitration, however, shall prevent either employee or COMPANY from seeking and obtaining equitable relief on a temporary or permanent basis from a court of competent jurisdiction by

(*concluded on page A-5*)

The trial court denied the defendant's alternative motions. It refused to enforce the arbitration agreement on the grounds that it was against public policy and that other clauses in the handbook made the arbitration provision ambiguous.[4]

The Court of Appeals reversed. 207 Mich App 308; 523 NW2d 904 (1994). It reasoned:

> The trial court appears to have denied defendant's motion in part because it found there was no "meeting of the minds" between plaintiff and defendant with regard to the arbitration clause. The record does not support such a finding. Before beginning employment, plaintiff signed an acknowledgment form that stated that she agreed to conform to the various procedures, rules, and regulations of the company as set forth in the handbook. Moreover, even were the record devoid of plaintiff's express acceptance of the handbook's provisions, it is well established

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(*continued from page A-4*)

> **instituting a legal action or other court proceeding in order to protect or enforce the rights of either or to prevent irreparable harm and injury. However, the court's jurisdiction over any such matter between the COMPANY and the employee shall be expressly limited only to the equitable issues and relief sought, and all issues involving monetary damages between the COMPANY and the employee shall be determined through arbitration as described above.**

4 **The court stated from the bench:**

> **This is a situation in which an employer hires an employee and as a condition, in giving that employee . . . employment hands her an employee handbook, and the employee handbook purports to handle any number of things, including providing an internal review process for dismissals. It is an agreement which, if one were to enforce it, would indicate that this employee could not bring an action for anything, including, by the way, [the] whistle blowers act, against this employer without subjecting it to arbitration. That strikes me as if not absurd certainly violative of public policy.**

under Michigan law that mutual assent to a term of employment is not required. *In re Certified Question*, 432 Mich 438; 443 NW2d 112 (1989); *Carlson* v *Hutzel Corp of Michigan*, 183 Mich App 508; 455 NW2d 335 (1990); *Toussaint* v *Blue Cross & Blue Shield of Michigan*, 408 Mich 579; 292 NW2d 880 (1980).[5]

Plaintiff's argument that the handbook specifically states that it does not create an enforceable contract is misguided. The provision plaintiff relies on addresses the at-will nature of plaintiff's employment, not the handbook in its entirety.

Finally, we find no "public policy" prohibition against the enforcement of a valid arbitration agreement that provides for meaningful arbitration in matters involving civil rights questions. See *Gilmer* v *Interstate/Johnson Lane Corp*, 500 US 20; 111 S Ct 1647; 114 L Ed 2d 26 (1991). To the contrary, arbitration has long been a favorable method of dispute resolution. *Detroit* v *AW Kutsche & Co*, 309 Mich 700; 16 NW2d 128 (1944). Thus, arbitration clauses are to be liberally construed with any doubts to be resolved in favor of arbitration. *Chippewa Valley Schools* v *Hill*, 62 Mich App 116; 233 NW2d 208 (1975). Contrary to plaintiff's suggestion, arbitration of plaintiff's claims will not result in the loss of her rights under the Civil Rights Act, but, instead, merely constitutes enforcement of an agreement to have those rights determined in a different forum. Arbitration does not impair the remedies

---

5 We note that the panel's citation of *In re Certified Question*, which held that an employer could *unilaterally* change a written policy, was misplaced. Assuming arguendo that the Michigan Arbitration Act applies, it provides that neither party to an arbitration agreement can revoke the agreement without the other party's consent. MCL 600.5011; MSA 27A.5011.

afforded under the statute. [207 Mich App 310-311.]

We granted leave to the plaintiff's appeal. 450 Mich 960 (1995). We note that the entire handbook was not presented to the trial court or to the Court of Appeals. After oral argument, we granted the plaintiff's motion to expand the record to include the entire handbook. It is seventy-one pages long and covers a broad scope of subjects.[6] The expanded record reveals that the handbook included an antidiscrimination policy statement.[7] In the introduction on page 2, the handbook further reserved in the defendant the right to modify any policy contained in the handbook "at its sole discretion."

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6 The table of contents lists the following headings:

> administrative policies, rules and procedures . . . salary and wage levels, promotions and transfers . . . absence from work . . . employee benefits . . . security provisions — nondisclosure of company trade secrets and confidential information . . . company's ownership of inventions and other developments . . . termination and dismissal . . . [and] arbitration of disputes.

7 On page 4, the handbook provided:

> It is the policy of the company to recruit, hire and promote without regard to physical handicap, race, religion, national origin, sex, age or veteran status. It is also company policy to require that all other personnel action such as compensation, transfers, company sponsored training, educational assistance, social and recreational programs, and all employee benefit programs are administered without regard to physical handicap, race, religion, national origin, sex, age or veteran status. It is important that every employee, regardless of status, understand the intent of and comply with this policy. Should you feel that someone has violated this policy, please contact the Chief Operating Officer, or any member of the Executive Committee, immediately.

We note that a contractual provision providing parallel protection against discrimination cannot supplant independent statutory and constitutional rights. *Betty* v *Brooks & Perkins*, 446 Mich 270, 289; 521 NW2d 518 (1994).

II

We turn first to whether the parties are bound by a valid arbitration agreement. It is undisputed that an arbitration provision is unenforceable if it is not a binding contract.[8] The opening statement in the handbook provides:

> This document is intended to establish and clarify certain employment policies, practices, rules and regulations (hereinafter collectively referred to as "Policies") of Reliable Business Computers, Inc., (hereinafter referred to as the "company"). Except as may otherwise be provided, the Policies will apply to all company employees, and it is each employee's responsibility to assure that his/her own conduct is in conformity with those Policies. *It is important to recognize and clarify that the Policies specified herein do not create any employment or personal contract, express or implied*, nor is it intended nor expected that the information provided in this document will provide sufficient detail to answer any and all questions which may arise. *NOTWITHSTANDING ANY OF THE SPECIFIC POLICIES HEREIN, EACH EMPLOYEE HAS THE ABSOLUTE RIGHT TO TERMINATE HIS/HER OWN EMPLOYMENT AT ANY TIME, WITHOUT NOTICE, AND FOR ANY REASON WHATSOEVER, AND THE COMPANY HAS THE SAME RIGHT.*
>
> From time to time, the company specifically reserves the right, and may make modifications to any or all of the Policies herein, at its sole discretion, and as future conditions may warrant. In the event employees have any questions relative to any of the Policies, they are urged to contact their supervisor for clarification purposes.

* * *

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8 **4 Am Jur 2d, Alternative Dispute Resolution, § 70, pp 129-130. Assuming arguendo that the MAA applies, it provides the same contractual requirements. MCL 600.5001(2); MSA 27A.5001(2).**

> New employees will receive a copy of this document at the time of formal hire. Upon receipt, all employees will sign the Employee Acknowledgement, acknowledging receipt of this document. [Emphasis added.]

This demonstrates that the defendant did not intend to be bound to any provision contained in the handbook. Consequently, we hold that the handbook has not created an enforceable arbitration agreement with respect to this dispute. We note that the above opening statement was not part of the record before the Court of Appeals. Had the Court of Appeals been able to examine the entire handbook, we are confident that it would have reached the same conclusion. We hold that the defendant was not entitled to summary disposition.

III

Although a majority of this Court saves the public policy issue for another day, because the Court of Appeals addressed it, I believe that we should decide it as well. Therefore, I turn now to the issue whether private employers *can* require employees, as a condition of employment, to waive prospectively their right to pursue civil rights claims in a judicial forum.

As I will demonstrate, Michigan has a long history of stalwartly defending individuals from invidious discrimination in their pursuit of basic civil liberties, such as equal opportunity in the pursuit of employment. Unlike federal law, Michigan also has an unwavering history of faithfully defending an aggrieved individual's right to a judicial forum to remedy unlawful discrimination.

The defendant relies on federal title VII and age discrimination (ADEA) case law. However, it is axiomatic that even under federal law, "an employee may not prospectively waive his or her rights under either Title VII or the ADEA." *Adams* v *Philip Morris, Inc*, 67 F3d 580,

584 (CA 6, 1995).[9] Likewise, we have held that the rights secured by the Michigan Civil Rights Act are "nonnegotiable state rights." *Betty* v *Brooks & Perkins*, 446 Mich 270, 282; 521 NW2d 518 (1994). "These are rights that apply to all employees, whether or not they belong to a union. Such rights cannot be waived or conditioned on success at the bargaining table." *Id.* The defendant and its amici curiae would have us believe that the only interest at stake in enforcing a prospective arbitration agreement is the parties' choice of forum in which an aggrieved party may pursue statutory remedies. We should decide whether a prospective waiver of an aggrieved individual's right to a judicial forum, which is required of the employee as a condition of employment, comports with Michigan public policy as reflected in our constitution, civil rights statute, and case law.

The issue before us would be one of first impression. There are several layers of considerations that I will address. First, I will briefly review the prevailing precedent with respect to federal discrimination claims. Second, I will consider whether Michigan civil rights law is substantially similar to federal antidiscrimination law or whether it is materially different with respect to an aggrieved individual's access to a judicial forum. I will then trace the role of an aggrieved individual's access to a judicial forum in the development of Michigan civil rights law to determine whether Michigan public policy precludes the enforcement of prospective arbitration agreements in employment contracts with respect to statutory civil rights claims.

Federal Discrimination Claims

The Court of Appeals relied on *Gilmer*, *supra*, in holding that public policy did not prevent the enforce-

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9 **See also *Kendall* v *Watkins*, 998 F2d 848, 851 (CA 10, 1993) ("an employee may agree to waive Title VII rights that have accrued, but cannot waive rights that have not yet accrued").**

ment of a valid prospective arbitration agreement. 207 Mich App 311. In 1991, the *Gilmer* Court held that a broadly worded arbitration clause in a securities registration form, which is often referred to as a stock broker U-4 form, covered an ADEA claim. In doing so, the Court found that the Federal Arbitration Act (FAA) applied and that it evidenced a "'liberal federal policy favoring arbitration agreements.'" *Id.* at 25 (citation omitted). However, the FAA expressly excludes from coverage "contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce." 9 USC 1.[10] Referencing this clause, *Gilmer* expressly did not decide what the result would be if the arbitration clause had been contained in an employment contract. *Id.* at 25, n 2. *Gilmer* also distinguished a trilogy of cases that had arisen in the collective bargaining setting: *Alexander* v *Gardner-Denver Co*, 415 US 36; 94 S Ct 1011; 39 L Ed 2d 147 (1974) (title VII claim), *Barrentine* v *Arkansas-Best Freight System, Inc*, 450 US 728; 101 S Ct 1437; 67 L Ed 2d 641 (1981) (right to minimum wage claim under the Fair Labor Standards Act), and *McDonald* v *West Branch*, 466 US 284; 104 S Ct 1799; 80 L Ed 2d 302 (1984) (42 USC 1983 claim).

Following *Gilmer*, there has been a lot of appellate activity involving the applicability of prospective arbitration agreements to federal discrimination claims. Although there remain many unanswered questions in *Gilmer's* wake, two general rules have emerged. First, an arbitration clause in a collective bargaining agreement does *not* extend to federal statutory claims of discrimination. E.g., *Pike* v *Burlington Northern R Co*, 273 Mont 390, ___; 903

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10 The courts remain split over the scope of 9 USC 1. See *Williams* v *Katten, Muchin & Zavis*, 837 F Supp 1430, 1438-1439 (ND Ill, 1993) (listing cases holding that the exclusionary clause is limited to transportation industries employment contracts and cases holding that the clause extends to all employment contracts); *Fletcher* v *Kidder, Peabody & Co*, 81 NY2d 623, 637; 601 NYS2d 686; 619 NE2d 998 (1993) (citing cases).

P2d 1352, 1357 (1995). One overriding rationale for this rule is that civil rights are individual personal rights, while union bargaining representatives act for the benefit of the group. The apparent "tension between collective representation and individual statutory rights" led the Court in the *Alexander* line of cases to protect the rights of the individual employee by not enforcing arbitration agreements in collective bargaining agreements with respect to claims of unlawful discrimination. *Gilmer*, 500 US 35.

The second rule is that an arbitration clause in a stock broker U-4 form *does* extend to title VII claims, in addition to ADEA claims. *Bender* v *AG Edwards & Sons, Inc*, 971 F2d 698 (CA 11, 1992); *Alford* v *Dean Witter Reynolds, Inc (On Remand)*, 939 F2d 229 (CA 5, 1991).

The defendant cites numerous cases for the proposition that prospective arbitration agreements in individual employment contracts have been enforced with respect to federal and state discrimination claims.[11] However, those cited cases arose under the FAA or were not ordinary employment contracts.[12] I have found

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11 In *Mago* v *Shearson Lehman Hutton, Inc*, 956 F2d 932 (CA 9, 1992), the court assumed that the FAA applied because the employee did not challenge its applicability. Applying the FAA, the court found that a privately negotiated arbitration agreement in an employment application covered a title VII claim. *Id.* at 935. Likewise, in *DiCrisci* v *Lyndon Guaranty Bank of New York*, 807 F Supp 947 (WD NY, 1992), the court applied the FAA and enforced an arbitration clause in an employment contract with respect to title VII and New York discrimination claims. However, the court reserved the issue of punitive damages under state law for postarbitration consideration. *Id.* at 953-954. See also *Scott* v *Farm Family Life Ins Co*, 827 F Supp 76 (D Mass, 1993) (applying the FAA, the court held that an arbitration agreement in an insurance sales agent contract covered title VII and state discrimination claims), and *Hull* v *NCR Corp*, 826 F Supp 303 (ED Mo, 1993) (applying the FAA, the court enforced arbitration agreement with respect to title VII, the ADEA, and state discrimination claim).

12 See *Williams*, n 10 *supra*, 837 F Supp 1438, characterizing a partnership agreement as an employment contract and enforcing a prospective arbitration clause with respect to a title VII claim. See also *Dancu* v *Coopers & Lybrand*, 778 F Supp 832 (ED Pa, 1991), aff'd 972 F2d 1330 (CA 3, 1992) (partnership agreement).

other cases that have distinguished the contract at issue, such as a stock broker U-4 form, as *not* being an employment contract. *Willis* v *Dean Witter Reynolds, Inc*, 948 F2d 305, 312 (CA 6, 1991); *Alford*, 939 F2d 230, n * ("[c]ourts should be mindful of this potential issue in future cases").[13] On the basis of the fact that the *Gilmer* Court expressly distinguished employment contracts, *id.* at 25, n 2, and because many subsequent cases have continued that distinction, I would find that the cases upholding prospective arbitration agreements in stock broker U-4 forms, including *Gilmer*, are not on point in the case at hand because they did not concern ordinary employment contracts.[14] Hence, I would find that there remains a conflict among courts regarding whether arbitration agreements in individually negotiated employment contracts are enforceable under the FAA with respect to claims of unlawful discrimination.

In any event, the defendant has not argued that the instant case is controlled by the FAA. Therefore, even if prospective arbitration agreements in individually negotiated employment contracts are enforceable with respect to federal and other state discrimination claims when the FAA does apply, such cases would not necessarily apply here.[15]

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13 The defendant has pointed out *Beauchamp* v *Great West Life Assurance Co*, 918 F Supp 1091 (ED Mich, 1996). However, *Beauchamp* involved a U-4 form, which the court expressly stated was *not* an employment contract. *Id.* at 1094, n 2.

14 There may also be an issue whether the level of sophistication of the employee may factor into the enforceability of an arbitration agreement. See *Asplundh Tree Expert Co* v *Bates*, 71 F3d 592, 602 (CA 6, 1995) (applying the FAA and noting that "the arbitration clause is contained in an employment contract between a highly paid executive and his corporate employer").

15 Further, even if the FAA were to apply, it can be surmounted by contrary legislative or constitutional intent. See discussion *infra* at 29.

Title VII and ADEA Distinguished From the Michigan Civil Rights Act

Even though we often look to title VII precedent in interpreting our own civil rights statute,[16] we decline to do so when the Michigan statute provides greater protection to victims of discriminatory actions than title VII provides.[17] Title VII requires claimants to exhaust administrative remedies with the Equal Employment Opportunity Commission (EEOC) before pursuing judicial relief.[18] Likewise, the ADEA requires an aggrieved individual to seek relief first with the EEOC.[19] In sharp contrast, the Michigan Constitution expressly prohibits an exhaustion of administrative remedies requirement for civil rights claims.[20] In addition, the Legislature has underscored this policy by also expressly prohibiting an exhaustion of administrative remedies requirement.[21]

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16 *Radtke* v *Everett*, 442 Mich 368, 381-382; 501 NW2d 155 (1993).

17 *Eide* v *Kelsey-Hayes Co*, 431 Mich 26, 36-38; 427 NW2d 488 (1988).

18 42 USC 2000e-5(b), (c), (e). See *Shannon* v *Ford Motor Co*, 72 F3d 678, 684 (CA 8, 1996):

> In general, "[e]xhaustion of administrative remedies is central to Title VII's statutory scheme because it provides the EEOC the first opportunity to investigate discriminatory practices and enables it to perform its role of obtaining voluntary compliance and promoting conciliatory efforts." To exhaust her remedies, a Title VII plaintiff must timely file her charges with the EEOC and receive, from the EEOC, a "right to sue" letter. 42 USC 2000e-5(b), (c), (e). The proper exhaustion of administrative remedies gives the plaintiff a green light to bring her employment-discrimination claim, along with allegations that are "like or reasonably related" to that claim, in federal court. [Citations omitted.]

19 29 USC 626(d); *Gilmer*, 500 US 27.

20 See Const 1963, art 5, § 29.

21 MCL 37.2803; MSA 3.548(803) provides:

> This act shall not be construed to diminish the right of a person to direct or immediate legal or equitable remedies in the courts of this state.

Even if federal precedent had answered the issue at hand with respect to ordinary individually negotiated employment contracts, and I have found above that it has not, I would find that the Michigan constitutional and statutory enforcement scheme for civil rights is significantly different from the statutory enforcement scheme for federal discrimination statutes with respect to an aggrieved individual's access to judicial remedies. Accordingly, I would decline to rely on federal precedent.

IV

Although I do not find *Gilmer* to be on point with respect to the issue at hand, I do find the Court's approach to be a suitable starting point. *Gilmer* balanced the public policy in favor of arbitration against the public policy underlying the statutory claim at issue. In doing so, the Court examined the statutory language and congressional intent to determine whether Congress intended "'to preclude a waiver of judicial remedies for the statutory rights at issue.'" *Gilmer*, 500 US 26 (citation omitted). Similarly, I will consider the legislative intent behind the Michigan Civil Rights Act. But, more importantly, because civil rights received profound consideration by the Michigan Constitutional Convention[22] and preeminent status in the 1963 Constitution itself,[23] I would first consider the people's intent when they adopted the Michigan Constitution.

Pre-1963 Private Judicial Remedies

To understand what occurred in 1963, it is important to remember what brought us to that point. Michigan was at the forefront in the development of civil rights long before the Civil Rights Act was enacted. Early on,

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22 **See 1 Official Record, Constitutional Convention 1961, pp 739-752.**

23 **Const 1963, art 1, § 2.**

the right to pursue private judicial remedies has been recognized as fundamental to the enforcement of civil rights. *Ferguson* v *Gies*, 82 Mich 358; 46 NW 718 (1890), was a watershed decision by which Michigan parted company from majority rule. The *Ferguson* Court rejected the "separate but equal" theory six years before the United States Supreme Court adopted it in the infamous *Plessy* v *Ferguson*, 163 US 537; 16 S Ct 1138; 41 L Ed 256 (1896). More important for us in the instant case is that *Ferguson* held that a black man who had been aggrieved by unlawful discrimination had a right to pursue private judicial relief.

At issue in *Ferguson* was whether a statutory provision, which penalized racial discrimination as a misdemeanor, precluded a separate private civil suit for damages. The Court held that it did not. The Court stated:

> The general rule, however, is that where a statute imposes upon any person a specific duty for the protection or benefit of others, if he neglects or refuses to perform such duty, he is liable for any injury or detriment caused by such neglect or refusal, if such injury or hurt is of the kind which the statute was intended to prevent; nor is it necessary in such a case as this to declare upon or refer to the statute. *The common law as it existed in this State before the passage of this statute, and before the colored man became a citizen under our Constitution and laws, gave to the white man a remedy against any unjust discrimination to the citizen in all public places.* It must be considered that, when this suit was planted, the colored man, *under the common law of this State*, was entitled to the same rights and privileges in public places as the white man, and he must be treated the same there; and that *his right of action for any injury arising from an unjust discrimination against him is just as perfect*

> *and sacred in the courts as that of any other citizen.* This statute is only declaratory of the common law, as I understand it now to exist in this State. [*Id.* at 365 (emphasis added).]

Ferguson began to establish that, in Michigan, whenever a particular equal protection right is recognized, whether by constitution, statute, or common law, then fused to that right is the right to pursue judicial relief.[24] In other words, adhering to the substantive right is "a remedy against any unjust discrimination." *Id.* In *Ferguson*, the substantive right recognized was that black men were entitled to equal access to public accommodations.

The right to pursue a private civil action has been reaffirmed many times. Even in the absence of a common-law remedy and in the absence of a statutory remedy, our Court long ago held that there was a private civil remedy for violations of a civil rights statute. *Bolden* v *Grand Rapids Operating Corp*, 239 Mich 318, 328; 214 NW 241 (1927). In 1944, this Court reaffirmed *Bolden* in *St John* v *General Motors Corp*, 308 Mich 333, 336; 13 NW2d 840 (1944). *St John* held that a penal statute[25] that prohibited gender wage discrimination included a private civil remedy. "The statute establishes specified personal civil rights and if there has been discrimination between sexes in the instances at bar the remedy by action at law is available to claimants." *Id.*

As the Legislature has expanded the scope of civil rights over the years, the right to pursue judicial reme-

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24 Incidently, arbitration was a recognized form of dispute resolution long before 1890. See syllabus for *Chicago & Michigan L.S.R. Co* v *Hughes*, 28 Mich 186 (1873), recapping arbitration principles.

25 1919 PA 239, reenacted by 1931 PA 328, § 556 (1940 CL 17115-556; MSA 28.824).

dies has been coupled with the expansion.[26] In 1955, the Fair Employment Practices Act (FEPA) was enacted,

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26 Justice Adams recapped the *Ferguson* rule and the Michigan statutory history of civil rights in *Beech Grove Investment Co* v *Civil Rights Comm*, 380 Mich 405, 434-435; 157 NW2d 213 (1968):

> When Gies undertook to conduct a public business, he did so subject to the requirement that the business be carried on without "unjust discrimination." Ferguson's remedy, even though statutorily stated, stemmed from the common law. Ferguson's right was the right not to be discriminated against because of religion, race, color or national origin. As a corollary of that right he was entitled to receive the same treatment anyone else would receive — no better, no worse.
>
> * * *
>
> The public policy with regard to civil rights in laws enacted by the legislature has been to ban discrimination. It has been summarized in [Cramton,] *The Powers of the Michigan Civil Rights Commission*, [63 Mich L R 5, 25-26 (1964)] . . . , as follows . . . :
>
> > "Other civil rights relating to racial, religious, and ethnic discrimination have been created by the legislature over the past hundred years. The first civil rights legislation was enacted in 1867; it prohibited racial segregation in public education. In 1869, a statute prohibited life insurance companies that were doing business within the State from making any distinction or discrimination between white and colored persons. The ban against miscegenation was removed in 1883. In 1885, criminal sanctions were provided for denial of equal treatment in public places of accommodation, amusement, and recreation; racial discrimination in the selection and qualification of jurors was prohibited in the same year. The Michigan Supreme Court rejected the 'separate but equal' doctrine in 1890, and held that a civil action for damages could be brought for discriminatory treatment in a public accommodation. The public accommodations statute was strengthened in 1937, 1952, and 1956; the 1952 amendment extended coverage to 'government housing.' Finally, in 1955, the fair employment practices act created 'a civil right' in 'the opportunity to obtain employment without discrimination because of race, color, religion, national origin or ancestry' and established remedies for the enforcement of this right. Domestic help and employers with less than eight employees were excluded from the coverage of the act."

which created a civil right to equal opportunity in the pursuit of employment[27] in the private sector, as well as the public sector.[28] *Pompey* v *General Motors Corp*, 385 Mich 537, 551-552; 189 NW2d 243 (1971), explained that this was the first time that the right to be free from unlawful discrimination extended to private employment. Even though the statute did not create a private civil action, *Pompey* held that a statutorily created civil right included a private action for civil damages in addition to any statutory enforcement mechanism. *Id.* at 560. The Court explained:

> In 1955, the fair employment practices act created a civil right in the opportunity to obtain employment without discrimination because of race, color, religion, national origin or ancestry. Defendant contends, and we agree, that prior to the passing of this important legislation in 1955, there was in Michigan no recognized legal remedy for acts of discrimination based on race in private employment. While a right of action was recognized for racial discrimination in public accommodation (*Ferguson* v *Gies* [1890], 82 Mich 358) and in the enjoyment of various other civil rights, the right to be free from discrimination on account of race in private employment was not rewarded as a civil right entitled to protection of the law.

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27 **The opportunity to obtain employment without discrimination because of race, color, religion, national origin or ancestry is hereby recognized as and declared to be a civil right. [1955 PA 251, § 1, MCL 423.301; MSA 17.458(1), repealed by 1976 PA 453, § 804 (Michigan Civil Rights Act).]**

28 **"Employer" was defined as:**

> **[t]he state or any political or civil subdivision thereof, any person employing 8 or more persons within the state and any person acting in the interest of an employer, directly or indirectly. [1955 PA 251, § 2(b).]**

The FEPA excluded from covered employees "any individual employed in the domestic service of any person." Section 2(c).

> We recognize that the fact that there was no preexistent common-law remedy for racial discrimination in private employment is generally highly significant in determining the exclusiveness of the statutory remedy. The general rule, in which Michigan is aligned with a strong majority of jurisdictions, is that where a new right is created or a new duty is imposed by statute, the remedy provided for enforcement of that right by the statute for its violation and nonperformance is exclusive. Correlatively, a statutory remedy for enforcement of a common-law right is deemed only cumulative.
>
> But courts have forged exceptions to these general rules when the statutory rights infringed were civil rights. Although there is some authority to the contrary most decisions have held that a person aggrieved by the violation of a civil rights statute is entitled to pursue a remedy which will effectively reimburse him for or relieve him from violation of the statute, notwithstanding the statute did not expressly give him such right or remedy. [*Id.* at 551-553 (citations omitted).]

Turning to the argument of the General Motors Corporation that there was no private cause of action, *Pompey* rejected the argument and restated the rule:

> Our Court unqualifiedly rejected such an argument when dealing with civil rights statutes, concluding that the aggrieved person may maintain an action for damages for injuries suffered by the violation of the civil rights statute despite the fact that the statute made no express provision for such recovery. We cited as the controlling principle:
>
> > "'In cases where there has been illegal discrimination the person aggrieved has

> clearly a civil right of action for damages, and this is true although the provision for the enforcement of a civil rights statute under which the complainant claims redress provides for a criminal prosecution only. This right accrues by virtue of the general rule that where a statute imposes upon any person a specific duty for the protection or benefit of others, neglect or refusal to perform the duty creates a liability for any injury or detriment caused by such neglect or refusal, if the injury or hurt is of the kind which the statute was intended to prevent.'" [*Id.* at 555-556 (citations omitted).]

1963 Michigan Constitution

In 1963, the people of Michigan took another significant step when they adopted the new Michigan Constitution. The constitution provides:

> No person shall be denied the equal protection of the laws; nor shall any person be denied the enjoyment of his civil or political rights or be discriminated against in the exercise thereof because of religion, race, color or national origin. The legislature shall implement this section by appropriate legislation. [Const 1963, art 1, § 2.]

The Address to the People explained that a primary mission of this provision was to ensure equal opportunity in the pursuit of employment.[29] By doing so, this provision "elevated an employee's statutory right under

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29 **The Address to the People was the drafters' explanation of what they believed the provisions meant. It stated:**

> **The convention record notes that "the principal, but not exclusive, areas of concern are equal opportunities in employment, education, housing and public accommodations." [2 Official Record, Constitutional Convention 1961, p 3363.]**

the FEPA to the status of a constitutional right . . . ." *Boscaglia* v *Michigan Bell Telephone Co*, 420 Mich 308, 314, n 8; 362 NW2d 642 (1984). Although the provision is self-executing with respect to state action,[30] the people left it up to the Legislature to implement the constitutional provision with respect to private discrimination.[31] However, once the Legislature acts, as it has with respect to gender discrimination in private employment, the scope and the availability of remedies for unlawful discrimination are vital to effectuating the intent of the people and of the Legislature.

In 1963, the people did not leave the enforcement of the equal protection provision to chance when they constitutionally created the Michigan Civil Rights Commission.

> There is hereby established a civil rights commission . . . . It shall be the duty of the commission in a manner which may be prescribed by law to investigate alleged discrimination against any person because of religion, race, color or national origin in the enjoyment of the civil rights guaranteed by law and by this constitution, and to secure the equal protection of such civil rights without such discrimination. . . .
>
> The commission shall have power, in accordance with the provisions of this constitution and of general laws governing administrative agencies, to promulgate rules and regulations for its own procedures, to hold hearings, administer oaths, through court authorization to require the attendance of witnesses and the submission of records, to take testimony, and to issue appro-

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30 See *Civil Rights Dep't ex rel Forton* v *Waterford Twp Dep't of Parks & Recreation*, 425 Mich 173, 186; 387 NW2d 821 (1986).

31 *Boscaglia*, 420 Mich 314, n 8, citing *Pompey*, 385 Mich 559, n 20, and *Cramton*, n 27 *supra*, p 30.

> priate orders. The commission shall have other powers provided by law to carry out its purposes. *Nothing contained in this section shall be construed to diminish the right of any party to direct and immediate legal or equitable remedies in the courts of this state.*
>
> Appeals from final orders of the commission, including cease and desist orders and refusals to issue complaints, shall be tried de novo before the circuit court having jurisdiction provided by law. [Const 1963, art 5, § 29 (emphasis added).]

The purpose of the highlighted sentence is fundamental in resolving the instant issue. An instructive article written by Professor Roger Cramton has been relied on by this Court many times. See Cramton, *The powers of the Michigan Civil Rights Commission*, 63 Mich L R 5 (1964). Professor Cramton discussed the creation of the Civil Rights Commission and its effect on judicial remedies.

> The third sentence of the second paragraph of article V, section 29 provides: "Nothing contained in this section shall be construed to diminish the right of any party to direct and immediate legal or equitable remedies in the courts of this state." This sentence, referred to as the "judicial remedies provision," was the subject of much confusion and debate in the convention, but its purport is reasonably clear. The convention did not intend to confer exclusive jurisdiction in the civil rights field on the Commission. *Remedies in the courts, including both those existing at the time and those subsequently created by legislative enactment or judicial decision, are not affected by the civil rights commission provision.* Thus, an individual who has been subjected to illegal discriminatory treatment in a place of public accommodation may bring a damage action in the circuit court against the business engaged in

> such discrimination; and the legislature may create new civil and criminal remedies for acts of private discrimination and may vest jurisdiction in the courts. [*Id.* at 22-23 (emphasis added).][32]

As Professor Cramton observed, the judicial remedies clause was the subject of much debate. While the debates accompanying the adoption of the Michigan Constitution are not controlling, they may be helpful in interpreting it. *Beech Grove Investment Co* v *Civil Rights Comm*, 380 Mich 405, 427; 157 NW2d 213 (1968) (opinion of Adams, J.). The debates accompanying the development of the judicial remedies clause reveal that the role of the judiciary in enforcing civil rights was to remain supreme.

On March 29, 1962, the delegates considered the Donnelly Amendment,[33] which would be the precursor to the sentence that was eventually adopted. In offering the proposal, Miss Donnelly stated:

> The desire to protect citizens should be most vital to us all, the most important thing, in my opinion, the constitutional convention may do — not taxation, not reapportionment, but rights of citizens and humans who are under this state and who wish to live here. Anyone who suggests

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32 **In a footnote, Professor Cramton observed:**

> **The discussion of the "judicial remedies" provision may be found in 2 [Official Record, Constitutional Convention 1961, pp] 1999-2001, 2192-96, 2756-62. The debate clearly indicates that the primary intent was to preserve judicial jurisdiction in the civil rights field. [*Id.* at 23, n 76.]**

33 **The amendment would insert the sentence:**

> **These provisions shall not be construed to deny, or enable or allow the denial of, any direct and immediate legal or equitable remedy in the courts of this state, to any person affected thereby. [2 Official Record, Constitutional Convention 1961, p 1999.]**

> and that a commission will not abuse people that the courts of this state will abuse people quite frankly horrifies me. To me the last source of strength and relief of any free people is in the courts of any country, and without such provision giving the courts of this state some right to act, I believe that they cannot act, and they cannot aid any citizen who is feeling abuse, or who is wanting immediate direct relief.
>
> *This is constitutional language that we have spelled out. We have left very little to the legislature.* For a court to act they must find their authority, in my opinion, in the constitution. Therefore, I feel that if we really wish to protect all citizens from all abuse and we really believe that this is a high point, we must build in this a check and a balance, as we have in all other constitutional documents. I therefore urge the support of this amendment. [2 Official Record, Constitutional Convention 1961, p 1999 (emphasis added).]

Miss Donnelly later added:

> I intend that any individual who wants immediate legal or equitable remedy in the courts of the state should be able to go there immediately and directly, if that's what they want. *I feel this is a civil right of every person.* [*Id.* at 2000 (emphasis added).]

The opponents of the Donnelly Amendment urged that there should be an exhaustion of administrative remedies requirement. In contrast, the supporters of the amendment stressed the importance of access to the courts in the civil rights arena. For example, Mr. Habermehl stated:

> I have always been of the opinion that people's constitutional rights have been a long time accruing to each individual; that those rights are expressed

> in a document we call a constitution. That we have a court or judicial system set up which has a primary purpose of enforcing and safeguarding those rights. If the intention here is to create a commission that would deprive or even unduly delay the rights of the individual to any legal remedy that he might have, I suggest you are doing far more to harm civil rights than you are doing to help it. Certainly we cannot deprive persons, whether plaintiff or defendant, of insisting upon legal rights guaranteed to them. To do so would be a backward step in civil rights, not a forward one. I support the Donnelly amendment. [*Id.* at 2001.]

The Donnelly Amendment passed by a vote of seventy-eight yeas to thirty-six nays.

On April 6, 1962, the Committee of the Whole considered the Garvin Amendment, which would have deleted the previously adopted Donnelly Amendment. In the amendment's place, it would have substituted an election of remedies requirement, which would have provided that if either party initiated action in the agency, there would be an exhaustion of administrative remedies requirement before the courts could act. *Id.* at 2192-2196. This amendment was defeated by a vote of sixty-nine nays to forty-two yeas.

On April 24, 1962, the issue came up again with another proposed amendment that would delete the judicial remedies sentence. *Id.* at 2756-2759. The supporters of the amendment argued that the Civil Rights Commission should be given the same treatment that all other administrative agencies would receive, in particular, that *all* agencies would be shielded from judicial interference by an exhaustion of administrative remedies requirement. *Id.* at 2756-2758. Miss Donnelly again defended her judicial remedies sentence:

> If my memory serves me, this is the third time that I have defended this sentence or something

> similar thereto. . . . The difference between this commission and all other commissions is this is the only constitutionally created one. . . . This is an instance where we are setting something up in the constitution. . . . Where we're going to put something in the constitution, you've got to be sure it's broad enough to protect all and it will not derogate downward. The legislature cannot subtract this, in my opinion.
>
> *Therefore, in order to preserve the civil rights of any citizen to go to the courts of this state for their direct and immediate remedy, there is only one place we can do it, and that's here. And I believe that all the citizens should be protected in this right more than almost any other right we've ever gotten and ever had in our whole life. I submit that the only place that any rights have ever been protected have been in the courts of this land, and when you start saying the courts of the land may not act, then I am wondering what direction you really want to go, and do you really believe in the democracy and freedom of people or do you want a complete police state? Therefore, I am highly opposed to this amendment and suggest that it is being attacked in a rather dubious method.* [*Id.* at 2758 (emphasis added).]

The final speaker before the vote on the amendment was Mr. Ford, who supported the amendment. He stated in part:

> [T]here is no question, and there shouldn't be in the mind of any lawyer in this convention that we are making it impossible for the legislature to provide a system of procedure that would require certain matters to be taken before the commission before they were taken into the court. And that's what the effect of Miss Donnelly's language is. I know that this is the effect and I believe that this is what she intends,

> because I worked with her trying to perfect this, and you may remember that we passed over this matter once before, trying to clean up this language.
>
> Now, when we were cooperating with her, I thought we were trying to say that nothing in this section should be in derogation of the person's rights otherwise provided by the law. But what we are really saying here, and the effect of this last sentence is, when it says "Nothing contained in this section shall be construed to diminish the right of any party to direct and immediate legal or equitable" relief, we are forestalling the legislature from saying that certain types of cases must be followed in a certain procedural pattern before you go to the court. [*Id.*]

However, Mr. Ford's concerns were disregarded by the majority when it defeated the amendment by a vote of seventy-seven nays to thirty-seven yeas. Three more amendments[34] were offered that would weaken the lan-

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34 One proposal would have changed the language to provide as follows:

> Nothing contained in this section shall prohibit the legislature from enacting law granting any party the right to a direct and immediate legal or equitable remedy in the courts of this state. [*Id.* at 2759.]

A second proposal was to change the sentence to provide:

> Nothing contained in this section shall be construed to diminish the right of any party to direct and immediate legal or equitable remedies in the courts of this state, unless otherwise provided by law. [*Id.*]

The third proposal would have provided:

> Nothing contained in this section shall be construed to diminish the right of any party to direct and immediate legal or equitable remedies in the courts of this state after exhaustion of all administrative remedies that may be provided by law. [*Id.* at 2761.]

guage of the judicial remedies sentence and all three were defeated. *Id.* at 2759-2762. Later that same day, the final language of the sentence was adopted by a vote of 110 yeas to nine nays.

Expanding Civil Rights

As the scope of the equal protection provision has expanded, it has always included the private right to judicial remedies, whether expressly provided by statute or inferred by the judiciary.[35] The Legislature has done nothing in the subsequent history to impair or restrict the aggrieved individual's access to judicial remedies. Nor could it under Const 1963, art 5, § 29.

In 1976, the Michigan Civil Rights Act consolidated the existing civil rights statutes into one statute and, more importantly, expanded the scope of protection against discriminatory actions. House Legislative Analysis, HB 4055 (Second Analysis), December 30, 1976. Entwined with the new expanded rights was the right to bring a civil action in circuit court. MCL 37.2801; MSA 3.548(801).[36]

In *Boscaglia*, we found that the Civil Rights Act extended *Pompey*. We noted:

> The FEPA, enacted in 1955, declared that the opportunity to obtain employment without discrimination because of race, color, religion, national origin, or ancestry is a civil right, and stated a definition of an "unfair employment practice." In *Pompey* [at 560] . . . this Court

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35 The private civil remedy includes the right to jury. *King* v *General Motors Corp*, 136 Mich App 301, 308-309; 356 NW2d 626 (1984).

36 "A person alleging a violation of this act may bring a civil action for appropriate injunctive relief or damages, or both." Section 801(1). Additionally, we have previously found that the Civil Rights Act expanded the types of remedies beyond those provided by any of its predecessor statutes. *Eide*, n 17 *supra* at 35-36.

declared that an employee "can maintain a civil damage action for redress of his statutorily created right to be free from [racial] discrimination in private employment, and that this remedy may be pursued in addition to the remedial machinery provided by [the FEPA]."

The civil rights act, enacted in 1976, prohibits an employer from discriminating against a person on the basis of religion, race, color, national origin, age, sex, height, weight, or marital status. The act extended "this Court's decision in *Pompey* by expressly providing for direct access to circuit court for an aggrieved party." *Holmes* v *Haughton Elevator Co*, 404 Mich 36, 44; 272 NW2d 550 (1978) (Moody, J., concurring). This "direct access" provision states that a person alleging a violation of the act may bring a civil action for appropriate injunctive relief "or damages, or both," and that the term "damages" means "damages for injury or loss caused by each violation of this act, including reasonable attorney's fees." [*Boscaglia*, 420 Mich 314-315 (citations omitted).]

V

I would find that the judicial remedies provision in Const 1963, art 5, § 29, along with the tone of the debates that produced that provision, reveal that an aggrieved individual's access to judicial remedies is inseparably interwoven with the substantive civil rights and was intended by the people of Michigan to be the lifeblood of keeping those substantive civil rights alive. When the civil liberty at stake is equal opportunity in the pursuit of employment, I believe that the Michigan Constitution prevents us from granting the defendant's request to surgically sever the constitutional right to a judicial forum. In short, I would find that an aggrieved individual's access to a judicial forum to remedy viola-

tions of his nonnegotiable, constitutionally guaranteed, and legislatively articulated civil rights, is also a nonnegotiable state right. Accordingly, I would find that the people of Michigan and the Legislature intended to preclude prospective waivers of judicial remedies.

The defendant's amici curiae contend that both the FAA and the MAA apply and that the public policy favoring arbitration directs us to enforce a prospective arbitration agreement. Even if either statute does apply, I would follow *Gilmer*'s lead and hold that the public policy favoring arbitration can be outweighed by contrary constitutional or legislative intent. I have determined that in the instant case it is outweighed by the public policy expressed in the Michigan Constitution guaranteeing aggrieved individuals direct access to a judicial forum and by subsequent legislative intent.[37]

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37 I find persuasive the reasoning of the Colorado Supreme Court in *Lambdin* v *Dist Court In & For the 18th Judicial Dist*, 903 P2d 1126 (Colo, 1995). *Lambdin* held that clear legislative intent could preclude prospective waivers of a statutory right to pursue judicial remedies. *Id.* at 1131. There, the legislative intent was expressed in a statutory provision that provided: "Any agreement, written or oral, by any employee purporting to waive or to modify his rights in violation of this article shall be void." *Id.* at 1129, quoting Colorado's Wage Claim Act, 3B Colo Rev Stat 8-4-125 (1986). The court held that this provision included statutory judicial *remedies*. Colorado has adopted the Uniform Arbitration Act (UAA). By comparison, the MAA is Michigan's version of the same UAA.

Lambdin stated:

> We hold that the UAA cannot breathe life into an arbitration agreement that the Wage Claim Act deems void. Thus, notwithstanding the general validity of arbitration agreements under the UAA, the clear mandate of section 8-4-125 is that an employee may not waive the rights the General Assembly created in the Wage Claim Act by means of an arbitration agreement. [*Id.* at 1130.]

Likewise, I would hold that even if the MAA applies, it cannot override a clear state constitutional mandate that rights secured by the Michigan Civil Rights Act are nonnegotiable. *Betty*, 446 Mich 282. Those rights include an aggrieved individual's interwoven right to direct access to a judicial forum.

Additionally, I note that we have previously held that an employee's substantive civil rights are not for sale. *Betty*, 446 Mich 282. Along those same lines, there is another reason for not enforcing a prospective waiver of access to a judicial forum. The defendant argues that an employee is free to seek employment elsewhere if he does not wish to waive prospectively his right to a judicial forum. However, this argument is based on the erroneous assumption that job opportunities are fungible and readily available. In contrast, I believe that rights secured by our constitution and the Michigan Civil Rights Act should not rise or fall on an employee's economic ability to walk away from employment. Further, I find that the notion that an employer can require an employee, as a condition of employment, to "sell" his constitutionally guaranteed right to direct access to a judicial forum to enforce his Michigan civil rights *against that same employer* is repugnant to the long-standing Michigan public policy that holds dear civil liberties, such as the pursuit of employment.

VI

In conclusion, with respect to equal opportunity in the pursuit of civil liberties, such as employment, I believe that the right to be free from unlawful discrimination is of highest priority and too important to jeopardize. I further believe that the constitutionally guaranteed direct access to a judicial forum is so interwoven with the enforcement of civil rights in Michigan that we cannot separate them without potentially harming substantive civil rights. Accordingly, I would hold that the Michigan Constitution and our long-standing public policy preclude the enforcement of prospective arbitration agreements in employment contracts.

Finally, I would assert that I am not backing away from the public policy favoring alternative means of dispute resolution. For aggrieved individuals seeking to

pursue remedies for claims that have already accrued, arbitration may present a quicker and cheaper means of receiving relief, and I fully support the parties' voluntary intent in those cases. I would limit this opinion to the arbitration agreements in employment contracts entered into before any claim for unlawful discrimination has accrued.

VII

Finding no enforceable agreement to arbitrate this claim, we reverse the decision of the Court of Appeals and remand for further proceedings.

LEVIN and MALLETT, JJ., concurred with CAVANAGH, J.

CONCURRING OPINION

BOYLE, J. (concurring).

I agree with parts I, II, and VII of the lead opinion that the handbook language at issue in this case did not create a valid agreement to arbitrate civil rights claims. I express no opinion regarding whether or when an agreement to arbitrate might be found to be enforceable.

BRICKLEY, C.J., and RILEY and WEAVER, JJ., concurred with BOYLE, J.

Heurtebise v *Reliable Business Computers, Inc*

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OPINION

(State of Michigan — Court of Appeals)

(Submitted July 14, 1994, at Detroit;
Decided October 17, 1994, at 9:30 a.m.
Leave to appeal sought.)

(HEURTEBISE v RELIABLE BUSINESS COMPUTERS, INC. — Docket No. 152041)

Before: NEFF, P.J., and McDONALD and M. WARSHAWSKY,* JJ.

PER CURIAM

Defendant appeals by leave granted from an April 16, 1992, order denying its motion to dismiss or compel arbitration in this action filed by plaintiff pursuant to the Civil Rights Act, MCL 37.2101 *et seq.*; MSA 3.548(101) *et seq.*; alleging discriminatory treatment in her discharge from her employment with defendant. We reverse.

Plaintiff was hired by defendant in May 1989, at which time she received a copy of defendant's employee handbook. The handbook stated employment with defendant could be terminated at any time with or without cause. The handbook also provided a mechanism by which an employee whose employment was terminated could seek internal review of the decision. The handbook stated an employee who followed the internal review procedure and was dissatisfied with the result could seek arbitration of the dispute. The handbook stated "any dispute, matter or controversy involving claims of monetary damages and/or employment related matters . . . including, but not limited to, any and all claims relating to termination of employment" would be arbitrated pursuant to the rules of the American Arbitration Association. Plaintiff signed a document acknowledging

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* Circuit Judge, sitting on the Court of Appeals by assignment.

receipt of the handbook and agreeing to conform to the procedures, rules, and regulations set forth therein.

Following her termination from employment, plaintiff filed the instant action in circuit court. Defendant filed a motion to dismiss or, in the alternative, to compel arbitration. Defendant argued pursuant to the procedure outlined in the employee handbook, plaintiff was required to arbitrate the dispute. The trial court denied defendant's motion, apparently finding the provision in the handbook requiring arbitration to be ambiguous and contrary to public policy. We disagree.

The provision requiring arbitration is not ambiguous. The clause plainly states that claims for money damages must be submitted to arbitration. Likewise, there is no valid question that plaintiff's claims for discriminatory termination fall within the scope of the arbitration clause. The claims are indisputably "employment related."

The trial court appears to have denied defendant's motion in part because it found there was no "meeting of the minds" between plaintiff and defendant with regard to the arbitration clause. The record does not support such a finding. Before beginning employment, plaintiff signed an acknowledgment form that stated that she agreed to conform to the various procedures, rules, and regulations of the company as set forth in the handbook. Moreover, even were the record devoid of plaintiff's express acceptance of the handbook's provisions, it is well established under michigan law that mutual assent to a term of employment is not required. *In re Certified Question*, 432 Mich 438; 443 NW2d 112 (1989); *Carlson* v *Hutzel Corp of Michigan*, 183 Mich App 508; 455 NW2d 335 (1990); *Toussaint* v *Blue Cross & Blue Shield of Michigan*, 408 Mich 579; 292 NW2d 880 (1980).

Plaintiff's argument that the handbook specifically states that it does not create an enforceable contract is misguided. The provision plaintiff relies on addresses

the at-will nature of plaintiff's employment, not the handbook in its entirety.

Finally, we find no "public policy" prohibition against the enforcement of a valid arbitration agreement that provides for meaningful arbitration in matters involving civil rights questions. See *Gilmer* v. *Interstate/Johnson Lane Corp*, 500 US 20; 111 S Ct 1647; 114 L Ed 2d 26 (1991). To the contrary, arbitration has long been a favorable method of dispute resolution. *Detroit* v *AW Kutsche & Co*, 309 Mich 700; 16 NW2d 128 (1944). Thus, arbitration clauses are to be liberally construed with any doubts to be resolved in favor of arbitration. *Chippewa Valley Schools* v *Hill*, 62 Mich App 116; 233 NW2d 208 (1975). Contrary to the plaintiff's suggestion, arbitration of plaintiff's claims will not result in the loss of her rights under the Civil Rights Act, but, instead, merely constitutes enforcement of an agreement to have those rights determined in a different forum. Arbitration does not impair the remedies afforded under the statute.

The trial court erred in denying defendant's motion to compel arbitration.[1] Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

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1 **Defendant's failure to address on appeal the issue whether the trial court erred in denying defendant's motion to dismiss waives review of the issue. We note, however, that matters of procedural arbitrability (i.e. compliance with the procedural requirements of the arbitration clause or grievance procedure) are for the arbitrator to decide. *Bennett* v *Shearson, Lehman-American Express, Inc*, 168 Mich App 80; 423 NW2d 911 (1987).**

EXCERPTS FROM DEFENDANT-APPELLEE'S BRIEF ON APPEAL

(State of Michigan — Supreme Court)

(Dated: December 5, 1996 [*sic*, 1995])

(THERESA A. HEURTEBISE, Plaintiff/Appellant, vs. RELIABLE BUSINESS COMPUTERS, INC., a Michigan Corporation, Defendant/Appellee — Supreme Court No. 102109; Court of Appeals No. 152041; Lower Court No. 91-131165-CZ)

* * *

*TABLE OF CONTENTS**

TABLE OF CONTENTS i

COUNTER-STATEMENT OF JURISDICTION iii

COUNTER-STATEMENT OF QUESTIONS PRESENTED iv

INDEX OF AUTHORITIES vii

COUNTER-STATEMENT OF THE JUDGMENT AND RELIEF SOUGHT xiv

COUNTER-STATEMENT OF FACTS 1

ARGUMENT: 4

A. THE COURT OF APPEALS CORRECTLY HELD THE RELIABLE ACKNOWLEDGMENT FORM TOGETHER WITH THE HANDBOOK CONSTITUTES AN ENFORCEABLE AGREEMENT TO ARBITRATE 8

1. Heurtebise's Contention That There Is No Enforceable Arbitration Agreement Because The Handbook Disclaims Creation Of A Contract Is, In The Words Of The Court Of Appeals, "Misguided" 9

2. Heurtebise's Elliott-Larsen Claim Is Encompassed by the Reliable Arbitration Agreement 10

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* [*Printer's Note*]: Page numbers are to original pagination.

B. THE COURT OF APPEALS CORRECTLY HELD THAT THE ARBITRATION PROVISION IS NOT AMBIGUOUS .. 12

C. THE COURT OF APPEALS CORRECTLY DETERMINED THAT, UNDER MICHIGAN LAW HEURTEBISE'S EXPRESS ACCCEPTANCE OF THE MANDATORY ARBITRATION PROVISION ESTABLISHED BY RELIABLE IN ITS EMPLOYMENT HANDBOOK IS AN ENFORCEABLE TERM OF EMPLOYMENT 15

1. The Court Of Appeals Correctly Held, And Undisputed Facts Prove, That There Was A Meeting Of The Minds 15

2. Even Were Expressed Mutual Assent Lacking, The Provisions Of The Reliable Employment Handbook Give Rise To Enforceable Terms of Employment 17

3. The Agreement To Arbitrate Was Not A Contract Of Adhesion 21

D. THE COURT OF APPEALS CORRECTLY HELD THAT MICHIGAN PUBLIC POLICY FAVORS ENFORCEMENT OF THE RELIABLE ARBITRATION PROVISION 24

1. The Court Of Appeals Correctly Held That The Public Policy Favoring Arbitration Applies To The Elliott-Larsen Civil Rights Act Claims Brought By Heurtebise 24

a. There Is No Legislative Prohibition Against Arbitration Of Civil Rights Claims 26

b. The United States Supreme Court Supports Arbitration Of Statutory Claims ... 28

c. An Expansive Body Of Recent Federal And State Jurisprudence Favors The Arbitration Of Statutory Claims 31

2. A Civil Litigant May Waive Trial By Jury 33

3. The Arbitration Provision Does Not Strip The Circuit Courts Of Their Jurisdiction 37

4. The Arbitration Provision Does Not Divest The EEOC, the MCRC or the MDRC of Their Jurisdiction Over Civil Rights Claims 38

5. Case Law Cited By Heurtebise Involves Inapplicable Factual And Legal Settings And Does Not Establish Any Error By The Court Of Appeals 40

a. Unlike In The Instant Case, The *Prudential* Plaintiffs Claimed They Had Been Misled Concerning The Arbitration Agreement 40

b. Cases Declining To Require Arbitration Of Civil Rights Claims In A Collective Bargaining Context Are Inapplicable 43

E. THE COURT OF APPEALS CORRECTLY HELD THAT AN AGREEMENT TO ARBITRATE CIVIL RIGHTS QUESTIONS IS VALID IF IT PROVIDES "MEANINGFUL ARBITRATION" 44

CONCLUSION 47

RELIEF SOUGHT 48

COUNTER-STATEMENT OF JURISDICTION

Defendant-Appellee Reliable Business Computer Systems, Inc. ("Reliable") concurs in the statement of jurisdiction by plaintiff-appellant Theresa Heurtebise ("Heurtebise").

COUNTER-STATEMENT OF QUESTIONS PRESENTED

1. Whether the Court of Appeals' decision that the Reliable Employment Handbook ("Handbook") disclaimer addresses only the at-will nature of Heurtebise's employment and, thus, does not preclude enforcement of the arbitration agreement, accurately interpreted the parties' contract.

Plaintiff-Appellant answers: "NO"
The trial court answered: "NO"

The Court of Appeals answered: "YES"
Defendant-Appellee answers: "YES"

2. Whether the Court of Appeals' correctly determined that the arbitration provision at issue, which covered "any dispute," unambiguously covered Heurtebise's discrimination claim?

   Plaintiff-Appellant answers: "NO"
   The trial court answered: "NO"
   The Court of Appeals answered: "YES"
   Defendant-Appellee answers: "YES"

3. Whether the Court of Appeals properly found the trial court's holdings of no mutual assent or a meeting of the minds to be clearly erroneous where undisputed facts showed Heurtebise's express agreement to the terms of the Reliable Handbook?

   Plaintiff-Appellant answers: "NO"
   The trial court answered: "NO"
   The Court of Appeals answered: "YES"
   Defendant-Appellee answers: "YES"

4. Whether the Court of Appeals followed controlling Michigan law, e.g. *Touissant* v *Blue Cross and Blue Shield of Michigan*, 408 Mich 579; 292 NW2d 880 (1980) in determining that the dispute resolution arbitration procedure established by Reliable in its Handbook is enforceable?

   Plaintiff-Appellant answers: "NO"
   The trial court answered: "NO"
   The Court of Appeals answered: "YES"
   Defendant-Appellee answers: "YES"

5. Whether the Court of Appeals' adhered to well-established authority, e.g. *Gordon Sel-Way, Inc* v *Spence Bros. Inc.*, 438 Mich 488; 475 NW2d 704 (1991) and *Detroit* v *AW Kutsche & Co*, 309 Mich 700; 16 NW2d 128 (1944), in determining that Michigan law and public policy favor arbitration as a method of forum selection?

Plaintiff-Appellant answers: "NO"
The trial court answered: "NO"
The Court of Appeals answered: "YES"
Defendant-Appellee answers: "YES"

6. Whether the Court of Appeals' was correct in holding that arbitration of statutory claims merely constitutes enforcement of an agreement to have such claims determined in a chosen forum, and does not impair substantive rights?

Plaintiff-Appellant answers: "NO"
The trial court answered: "NO"
The Court of Appeals answered: "YES"
Defendant-Appellee answers: "YES"

7. Whether the Court of Appeals complied with established legal authority, including *Gilmer* v *Interstate/Johnson Lane Corp*, 500 US 20; 111 S Ct 1647; 114 L ED 2d 26 (1991) in ruling that "there is no public policy prohibition against the enforcement of a valid arbitration agreement that provided for meaningful arbitration in matters involving civil rights questions"?

Plaintiff-Appellant answers: "NO"
The trial court answered: "NO"
The Court of Appeals answered: "YES"
Defendant-Appellee answers: "YES"

8. Whether the Court of Appeals' properly held that the Reliable Handbook provides for "meaningful arbitration" (i) where the arbitration provision at issue meets all requirements of fairness, pursuant to *Renny* v *Port Huron Hosp*, 427 Mich 415; 398 NW2d 327 (1986), and (ii) where Heurtebise never challenged the provision's procedural fairness?

Plaintiff-Appellant answers: "NO"
The trial court did not address this issue.
The Court of Appeals answered: "YES"
Defendant-Appellee answers: "YES"

* * *

ARGUMENT

Heurtebise sought leave to appeal on essentially one ground — she claimed as her "primary issue" that the Court of Appeals was wrong in holding that she "knowingly waived" a right to pursue her Elliott-Larsen claim in court. Plaintiff-Appellee's Application for Leave to Appeal (hereinafter "Application") at 1. Despite the fact that this is the only issue Heurtebise has fairly preserved for appeal, her brief on appeal to this Court presents numerous "red herring" issues which, not only were not preserved for appeal but, for the most part, were never at issue in this case even at the trial court level.

For example, in her brief on appeal Heurtebise takes the position for the *first time* since her complaint was filed, that: (1) the Michigan Arbitration Act, MCL § 600.5001, *et seq*; MSA § 27A 5001, *et seq* (the "MAA"), only permits parties to prospectively agree to arbitrate only breach of contract claims; (2) the arbitration contract at issue is an unconscionable contract of adhesion; and (3) the arbitration contract at issue impermissibly divests the Michigan Civil Rights Commission ("MCRC"), the Michigan Department of Civil Rights ("MDCR") and the Equal Employment Opportunity Commission ("EEOC") of their jurisdiction over civil rights claims. Although it is Reliable's position that none of these issues are property before this Court, Reliable will nevertheless respond to Heurtebise's arguments to demonstrate their lack of merit.[3]

As stated above, the one issue which is fairly before this Court is whether the Court of Appeals was correct in holding that Heurtebise knowingly assented to arbitrate her Elliot-Larsen claim. That holding was based on: (1) the Court of Appeals' determination that

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[3] **Reliable's response to these newly raised, and largely irrelevant, issues should not be construed as an admission on Reliable's part that these issues are legitimately before this Court.**

Heurtebise's signing of the Handbook Acknowledgment constituted her assent to the terms contained in the Handbook and created a binding contract of arbitration; and (2) the Court of Appeals' determination that the arbitration contract was unambiguous and covered Heurtebise's Elliott-Larsen claims.

The Court of Appeals reached the right result because Heurtebise has never disputed that she *voluntarily* signed an agreement to conform to the Handbook's terms — which include the arbitration provision. Based on this fact, Michigan law (as discussed below) mandates a finding of mutual assent, and the trial court holding to the contrary was clearly erroneous on this front. Second, in holding the language of the arbitration provision unambiguous, the Court of Appeals correctly exercised its powers of *de novo* review of the trial court's legal conclusions to reach the only sensible result.

Heurtebise challenges the Court of Appeals' holding by attempting to place the burden of demonstrating a knowing waiver on Reliable. However, this Court has established that "the burden of proving nonarbatrability is assigned to the party seeking to avoid such an agreement and not to the party seeking to enforce such an agreement." *McKinstry* v *Valley OB-GYN Clinic, PC*, 428 Mich 167, 184; 405 NW2d 88 (1987). Therefore, Heurtebise, the party seeking to avoid arbitration pursuant to the agreement, bears the burden of proving an excuse, such as coercion, mistake, duress or fraud, once a showing is made that an arbitration agreement was entered by the parties. *Id.* at 181. Heurtebise has never attempted to make such a claim,[4] and, as the Court of

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4 Heurtebise previously argued that she is entitled to "discover[] and present evidence regarding the facts and circumstances surrounding the signing of [the] agreement." (Application at 11) Heurtebise never advanced this argument in earlier briefing and her

(*concluded on page A-45*)

Appeals correctly held, she cannot avoid the enforcement of her agreement.

With respect to public policy, Heurtebise has previously *conceded* that the Court of Appeals "*accurately* states that there is no public policy prohibition against the enforcement of a valid arbitration agreement that provides for meaningful arbitration in matters involving civil rights (sic)." (emphasis added) (Application at 12) Heurtebise has *never* disputed that the Reliable arbitration procedure comports with elementary fairness in every respect. Indeed, Heurtebise has previously admitted that she "*does not argue* that an agreement between an employer and an employee to arbitrate civil rights claims can never be valid." (emphasis added) (Application at 2).

Despite these admissions in her Application, Heurtebise, in her brief on appeal, has relied almost entirely on arguments based on her notions of fairness and public policy which, again, have not been preserved for appeal. It is clear that Heurtebise's repetitive intonation of catch-phrases such as "public policy" and "fundamental rights" is an attempt to mischaracterize the Court of Appeals' holding, which was based purely on basic issues of contract law, as a sinister threat to basic civil liberties. However, substantive rights under Elliott-Larsen are simply not at risk in this case. All potential statutory remedies that exist in the judicial forum to protect those rights under Elliott-Larsen are similarly available in the arbitral forum contemplated by the Reliable policy. As this Court specifically recognized

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(*continued from page A-44*)

failure to file an affidavit to support an excuse or absence of a knowing and voluntary waiver, is, itself, grounds for summary disposition. *McCart* v *J Walter Thompson, Inc*, 437 Mich 109, 116; 469 NW2d 284 (1991) ("a party opposing a motion for summary disposition is *required* to respond with affidavits or other evidentiary materials to show the existence of a factual dispute . . .") *Id.* at 115. (emphasis added).

in *McKinstry* v *Valley OB-GYN Clinic, PC, supra*, arbitration does not undermine a party's due process or substantive rights; "A party's voluntary decision to arbitrate neither involves the complete relinquishment of a constitutional right nor raises the specter of procedural due process violations . . . ." 428 Mich 167, 182; 405 NW2d 88 (1987).

This view is confirmed by the United States Supreme Court in *Gilmer* v *Interstate/Johnson Lane Corp, supra*, which decided that "by agreeing to arbitrate a statutory claim, a party does not forego the substantive rights afforded by the statute; it only submits to their resolution in an arbitral forum, rather than a judicial forum." 500 US at 21; 111 S Ct at 1652; 114 L Ed2d 26 (1991) quoting *Mitsubishi Motors Corp* v *Soler Chrysler-Plymouth, Inc*, 473 US 614, 628, 105 S Ct 3346, 3354, 87 L Ed2d 444 (1985). Thus, any allegation that a substantive right is at risk in the arbitral forum is unfounded. Heurtebise's contention that her civil rights have been violated is an inflammatory mischaracterization of the issues in this case.

This is not a case where either elementary fairness is at issue or where, in response to a motion for summary disposition, the litigant has established a defense to the signing of an arbitration agreement. To the contrary, Heurtebise: (i) conceded, in her Application, that there is no public policy issue raised here; (ii) did not dispute, in the Court's below, that the arbitration procedures are fundamentally fair; and (iii) acknowledged before the trial court and the Court of Appeals that she voluntarily agreed to abide by her employer's procedures, including arbitration of "any and all" termination disputes. Therefore, reversal by this Court is unwarranted. Furthermore, as explained in the pages that follow, reversing the Court of Appeals would, in effect, require that this Court dismantle long-standing and well-settled Michigan law.

* * *

[D][1]b. *The United States Supreme Court Supports Arbitration Of Statutory Claims*

When interpreting Elliott-Larsen, courts of this state rely for guidance on federal precedent on analogous questions. *Matras* v *Amoco Oil Co*, 424 Mich 675; 385 NW2d 586 (1986). The U.S. Supreme Court's holding in *Gilmer* v *Interstate/Johnson Lane Corp*, *supra*, persuasively supports ordering Heurtebise's claim to arbitration.

In *Gilmer*, the Supreme Court upheld arbitration of an employee's claim under the Age Discrimination in Employment Act of 1967, 29 USC 621, *et. seq.*, ("ADEA") and articulated the public policy in favor of such arbitration. The plaintiff in *Gilmer*, a registered stock broker, sued his employer, a brokerage firm, alleging that the firm discharged him in violation of ADEA.

The firm filed a motion to compel arbitration of the ADEA claim, relying upon an arbitration agreement in the plaintiff's registration application, as well as the Federal Arbitration Act ("FAA") 9 USC § 1, *et seq. As a condition of his employment*, the plaintiff had to sign the Standard Application for Securities Industry Registration Form ("U-4 Form") used for registration of persons dealing in securities. The U-4 Form provided in part: "'[I] agree to arbitrate *any dispute*, . . . [that may arise between me any my firm] . . . that is required to be arbitrated under the rules . . . of the organizations with which I register." (Emphasis added) 111 S Ct at 1650.

The rule at issue in *Gilmer* was New York Stock Exchange ("NYSE") Rule 347 which provides for arbitration of: "*Any controversy* between a registered representative and any member or member organization *arising out of the employment or termination of employment* of such registered representative . . ." (Emphasis added) *Id.* At 1651. *Neither the securities form nor the NYSE Rule*

referred specifically to civil rights claims.[10] The Supreme Court held, however, that a statutory claim, such as an ADEA claim, "can be subjected to compulsory arbitration pursuant to an arbitration agreement . . . ." *Gilmer* at 1652. Furthermore, in challenging the waiver of a judicial forum for ADEA claims, the Supreme Court stated that: "questions of arbitrarily must be addressed with a healthy regard for the federal policy favoring arbitration." *Gilmer* at 1652.

The Supreme Court's reasoning in *Gilmer* applies in all respects to the instant case. The agreement to arbitrate in *Gilmer* arose out of the employment relationship, and, as is true for the instant case, was not contained in a separate written instrument. Arbitration was upheld nevertheless. The *Gilmer* arbitration provision also did not specifically list all potentially arbitrable claims. *Gilmer* confirms that this factor is no obstacle to arbitration.

Gilmer also deals with Heurtebise's objection that arbitration forces her to forego due process rights under Elliott-Larsen. Heurtebise in the instant case, echoing the plaintiff in *Gilmer*, argues that compulsory arbitration is improper because it deprives claimants of substantive rights provided for by statute. *Gilmer* rejects that notion: "by agreeing to arbitrate a statutory claim, a party does not forego the substantive right afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum." *Gilmer* at 1652.

Gilmer also reinforced the U.S. Supreme Court's previous holdings that arbitration as a means of dispute resolution is not foreclosed merely because a particular statute embodies a judicial enforcement process: "it is

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10 This fact is significant in view of Heurtebise's argument that a "knowing waiver" is one which specifies that civil rights claims are to be arbitrated. No such requirement was demanded by the Supreme Court in *Gilmer*.

by now clear that *statutory claims may be the subject of an arbitration agreement . . .*" (Emphasis added) *Gilmer* at 1642. Arbitration does not diminish or otherwise affect Heurtebise's substantive rights under Elliott-Larsen. The arbitration provision deals only with forum selection.

Also paralleling the facts in *Gilmer*, selection of competent, impartial arbitrators are provided in the Reliable Handbook, assuring fair arbitration proceedings. Furthermore, the instant arbitration clause came about as a result of a private two-party agreement to arbitrate. "Having made the bargain to arbitrate. the part[ies] should be held to it . . . ." *Gilmer* at 1652.

Heurtebise, recognizing that *Gilmer* is fatal to her public policy arguments, vainly attempts to distinguish it from her case. She points out that the arbitration provision in *Gilmer* was contained in a securities registration application and not an employment contract. However, that is a meaningless distinction. The importance of the *Gilmer* holding is that the United States Supreme Court determined that statutory civil rights claims are arbitrable.

c. *An Expansive Body Of Recent Federal And State Jurisprudence Favors The Arbitration Of Statutory Claims*

Overwhelming federal and state court precedent similarly hold that compulsory arbitration agreements are binding for employment discrimination claims. For example, in *Scott* v *Farm Family Life Ins Co*, 827 F Supp 76 (D Mass, 1993), claims of sex, marital status and pregnancy discrimination brought pursuant to Title VII and the Massachusetts Equal Rights Act were held subject to mandatory arbitration based on an arbitration clause contained in an *agent contract* providing that "*all disputes* arising under this agreement . . . shall be resolved by binding arbitration pursuant to the rules of the American Arbitration Association." *Id* at 77. (emphasis added)

Mago v *Shearson Lehman Hutton, Inc*, *supra* applied *Gilmer* to a Title VII claim and held that the terms of Shearson's *employment application* required arbitration of any controversy concerning compensation, employment or termination of employment.

In *Dancu* v *Coopers & Lybrand*, 778 F Supp 832 (ED Pa, 1991), aff'd 972 F.D. 1330 (CA 3, 1992), plaintiff executed a *partnership agreement* containing an arbitration provision applying to any claims or controversies arising out of the agreement or the practices and affairs of the firm. The court enforced the mandatory arbitration of plaintiff's age discrimination claim brought pursuant to ADEA.

Hull v *NCR Corp*, 826 F Supp 303 (ED MO, 1993), held enforceable the arbitration of plaintiff's claims of discrimination in violation of Title VII, the Missouri Human Rights Act and the ADEA based on an *employment contract* containing the following arbitration provision: "*any controversy* or claim arising out of or relating to this contract, or breach thereof, shall be settled by arbitration in accordance with the rules of the American Arbitration Association, and judgment upon the award rendered by the arbitrator may be entered in any court having jurisdiction thereof." *Id* at 304. (emphasis added).

In *DiCrisci* v *Lyndon Guar Bank*, 807 F Supp 947 (WD NY, 1992), claims brought pursuant to Title VII alleging gender discrimination, sexual harassment and hostile work environment held arbitrable under the FAA pursuant to a written *employment contract* providing that the parties "agree[d] that any dispute between them or claim by either of them against the other or any agent or affiliate of the other shall be resolved by binding arbitration . . ." *Id* at 949.

In *Williams* v *Katten, Muchin & Zavis*, 837 F Supp 1430 (ND Illinois, ED, 1993) a law firm partner alleging discrimination on the basis of race, sex and religion pur-

suant to Title VII and § 1981 ordered to arbitrate dispute pursuant to FAA based on *partnership agreement* providing that "[a]ny controversy or claim arising out of or relating to any provision of this Agreement or any other document or agreement referred to herein . . . shall be resolved by arbitration . . ." *Id* at 1432. *See, McNulty* v *Prudential-Bache Securities, Inc*, 87 F Supp 567 (ED NY, 1994) (claims of retaliatory discharge for missing 13 days work in serving on a federal grand jury pursuant to the Jurors' Act are arbitrable); *See also Cook* v *Barratt American, Inc*, 219 Cal App 3d 1004; Cal Rptr 629 (1990) cert den 500 US 932, 111 S Ct 2052, 114 L Ed2d 458 (1991); and *Sacks* v *Richardson Greenshield Securities, Inc*, 781 F Supp 1475 (ED Cal, 1991), both enforcing arbitration agreements with respect to state law claims of sex discrimination.

In non-employment contexts as well, the Supreme Court has repeatedly adhered to the principle that *statutory rights are arbitrable*. See *Mitsubishi Motors Corp* v *Soler Chrysler-Plymouth, Inc*, 473 US 614; 105 S Ct 3346; 87 L Ed 2d 444 (1985) (finding claims under the Sherman Act arbitrable); *Shearson/American Exp, Inc* v *McMahon*, 482 US 220; 107 S Ct 2332; 96 L Ed 2d 185 (1987) (finding claims under the civil provisions of RICO and § 10(b) of the Securities Exchange Act arbitrable); *Rodriguez De Quijas* v *Shearson/American Exp, Inc*, 490 US 477; 109 S Ct 1917; 104 L Ed2d 526 (1989) (finding claims under the Securities Act of 1933 arbitrable). All these cases involve important and fundamental property and other rights, yet arbitration was upheld because of the public policy in favor of alternative dispute resolution.

2. A Civil Litigant May Waive Trial By Jury

Heurtebise relies on *Barbour* v *Dept of Soc Ser*, 172 Mich App 275; 431 NW2d 482 (1988) and *Schafke* v *Chrysler Corp*, 147 Mich App 751; 383 NW2d 141 (1986), for the proposition that she is "guaranteed" a trial by

jury for her civil rights claims. Yet, neither of these cases either mandates a trial by jury or concerns the arbitral forum. The fact that the circuit court may be the only proper *judicial* forum for handling an Elliott-Larsen claim does not preclude enforcement of private, voluntary arrangements to resolve discrimination claims in an arbitral forum rather than a courtroom.

Contrary to Heurtebise's assertion that "fundamental" rights are abridged or at risk, a choice of forum decision deals purely with matters of procedure rather than substance because it is directed to the *mechanisms* for resolving the underlying disputes. *See Berkovitz* v *Arbib & Houlberg, Inc*, 230 NY 261, 270; 130 NE 288, 190 (1921) ("arbitration is a form of procedure whereby differences may be settled. It is not a definition of the rights and wrongs out of which differences grow." — J.Cardozo) (holding the New York arbitration statute of 1920, from which the Federal Arbitration Act was copied, to be purely procedural).

Heurtebise argues that the enforcement of the arbitration provision will strip her of her "fundamental constitutional and statutory rights to court access, a jury trial and administrative relief." (Appellant's brief, p. 30). It is certainly true that one who contracts to submit prospective claims to binding arbitration waives his or her right to court access and a jury trial. There is nothing alarming about that, as those rights may be waived by mere inadvertence — ie., failing to file a timely jury demand, or letting the statute of limitations run on a cause of action. Similarly, a plaintiff loses the right to file a complaint with the MCRC if the filing is not timely. *See* MCL 423.307(b).[11] Heurtebise is not the first plaintiff, however, to attempt to avoid mandatory

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11 Many rights can be waived merely by the litigant's failure to properly or timely assert or preserve them, including: 1) right to raise a constitutional question; 2) attorney-client privilege; 3) privilege against self-incrimination; and 4) right to appeal an issue.

arbitration by positing that she is being unfairly deprived of a constitutional right. However, this Court, in *McKinstry*, observed that:

> We do not infuse constitutional concerns equivalent to those in a criminal proceeding into a civil litigant's contractual choice-of-forum decision. A party's voluntary decision to arbitrate neither involves the complete relinquishment of a constitutional right nor raises the specter of procedural due process violations . . . The right to a jury trial in a civil action is therefore permissive, not absolute.

428 Mich at 183.

Heurtebise seems to take the position that the right to court access and a jury trial are more inviolate where Elliott-Larsen or other statutory civil rights claims are involved. Heurtebise offers fragmented language taken out of context to support this contention. For example, she states, citing *Constantinoff* v *Bixby Hosp*, 111 Mich App 575, 577; 314 NW2d 698 (1981): "Michigan law has recognized a strong policy 'favoring direct and immediate access to the courts' for civil rights claims." (Appellant's brief, p. 31). However, as this Court explained in *Holmes* v *Haughton Elevator Co*, 404 Mich 36, 42; 272 NW2d 550 (1978), "direct access to the courts" merely means that a plaintiff is not required to file a complaint with the MCRC, either as a sole remedy or as a precondition to filing a complaint in circuit court.

> We additionally predicated our decision upon our conviction that the constitutional delegates did not intend, in creating the Civil Rights commission, to vest it with exclusive jurisdiction over civil rights cases.

Heurtebise also stresses the importance of the "cumulative remedies" available under Elliott-Larsen and Title VII, but does not explain how an arbitration agreement will affect the number of remedies available. "Cumula-

tive remedies" refers, both in federal cases discussing Title VII and Michigan cases discussing Elliott-Larsen, to the fact that the administrative remedies available with the EEOC and the CRC are not a plaintiff's exclusive remedies, as they do not supplant a plaintiff's right to file a claim in circuit court. (*See, e.g. Alexander* v *Garnder-Denver*, 415 US 36; 94 S Ct 1011, 1020; 39 L Ed2d 147 (1974) ("Title VII was designed to supplement, rather than supplant, existing laws and institutions relating to employment discrimination). Nor, it seems, would the administrative remedies, as *non*-exclusive remedies, supplant a plaintiff's right to have a civil rights claim arbitrated.

Heurtebise relies on *Moore* v *Fragatos*, 116 Mich App 179; 321 NW2d 781 (1982), for the proposition that arbitration involves waiver of a constitutional right that can only be accomplished if the arbitration agreement expressly lists the particular claims. (Application at 9) Once again, controlling law refutes her position. In *McKinstry, supra*, this Court *specifically disagreed* with the holding of *Moore* "to the extent that it places the burden on the defendant to prove by clear and convincing evidence that the plaintiff knowingly, intelligently, and voluntarily waived [her] right to court access." *McKinstry* at 182. The *McKinstry* court held: (i) the right to a jury trial in a civil action is permissive, not absolute; and (ii) as a result, waiver of a jury trial in a civil case is "not tantamount to deprivation of a fundamental constitutional right." *Id.* at 183. Based on these conclusions, *McKinstry* upheld the presumption established in the Michigan Medical Arbitration Act, MCL 600.5040, *et seq*; MSA 27A.5040 *et seq*, that arbitration agreements signed in accordance with the Act are valid. Furthermore, as *McKinstry* also held, "Michigan law further presumes that one who signs a written agreement knows the nature of the instrument so executed and understands its contents." *Id.*

While Heurtebise attempts to place the burden of demonstrating voluntariness on Reliable, *McKinstry*

establishes that the party seeking to avoid the agreement, in this case Heurtebise, bears the burden of proving an excuse, such as coercion, mistake, duress or fraud. *McKinstry* at 181. Heurtebise has never attempted to make such a claim, and cannot avoid the enforcement of her agreement.

The U.S. Constitution does not confer such an unwaivable right to a jury trial in state court civil cases. *Id* at 183. Similarly, the Michigan Constitution provides that such a right is "waived in all civil cases unless demanded" by a party. *Id.*, citing Mich Const 1963, Art 1 § 14. Indeed, since the right to a jury trial in a civil case is permissive, not absolute, it may be waived as part of an arbitration agreement without resulting in an unconstitutional deprivation. This being so, there is no legal impediment to waiver by a litigant of the right to a jury trial by agreeing to arbitrate claims.

3. *The Arbitration Provision Does Not Strip the Circuit Courts of Their Jurisdiction*

Heurtebise argues that arbitration of her Elliott-Larsen claim divests the circuit courts of their jurisdiction over civil rights claims. She points to language contained in the statute to defend her argument that no Elliott-Larsen claim can ever be decided anywhere but in circuit court: "An action commenced pursuant to subsection (1) may be brought in the circuit court for the county where the alleged violation occurred, or for the county where the person against whom the civil complaint is filed resides or has his principal place of business." MCL 37.2801; MSA 3.548(801).

In interpreting this language as prohibiting an Elliott-Larsen claim from being arbitrated, Heurtebise cites *Baxter* v *Gates Rubber Co*, 171 Mich App 588; 431 NW2d 81 (1988) for the proposition that "MCL 37.2801 vests the circuit courts of this state with *exclusive* jurisdiction over Elliott-Larsen claims." (Heurtebise's brief on appeal, at 31-32). However, that case did not deal with

arbitration of an Elliott-Larsen claim, Rather, in *Baxter*, the plaintiff alleged damages in an amount less than $ 10,000 — over which claims the district courts have jurisdiction — but brought suit under Elliott-Larsen — over which claims the circuit court have jurisdiction. When faced with the tension between the two jurisdictional statutes, the Court of Appeals determined that the circuit courts should retain jurisdiction of the case despite the insufficiency of the amount in controversy.

Baxter, therefore, involved a dispute between two judicial forums. The *Baxter* court's determination that the circuit court has exclusive jurisdiction over Elliott-Larsen claims only dealt with a conflict between the district and circuit courts. *Baxter* has no application to the instant case.

Furthermore, any time parties decide to arbitrate an otherwise triable issue, the case is necessarily "taken away" from a court. Heurtebise's use of the pejorative term "stripped of their jurisdiction" is an inelegant attempt to portray arbitration as an overreaching usurpation of the judiciary's authority that the MAA and numerous judicial decisions conclusively refute.

4. *The Arbitration Provision Does Not Divest The EEOC, The MCRC or the MDRC of Their Jurisdiction Over Civil Rights Claims*

Heurtebise, again raising an issue which has nothing to do with this case, argues that:

> [T]he Court of Appeals has given employers free reign to oust the Equal Employment Opportunity Commission, the Michigan Civil Rights Commission, the Michigan Department of Civil Rights, the Board of Workers' Disability Compensation Magistrates . . . of their long-established jurisdiction over Michigan employees' claims.

(Appellant's brief on appeal, p. 53).

This argument, which is echoed in an *amicus* brief filed by the MCRC and the MCRC, has no relevance to the instant case. The MCRC and the MCRC have never been involved in this case. Heurtebise never pursued the administrative remedies available to her with those agencies, and Reliable has never asserted that the arbitration agreement arising from Heurtebise's acceptance of the Handbook divests any state or federal agency of their constitutionally- or statutorily-conferred police powers. As such, these issues have nothing to do with this case, and the Court of Appeals' decision has no impact on the scope of authority of any such agency. It is clear that Heurtebise has raised these issues in an attempt to escalate her run-of-the-mill contract case into a constitutional issue, and thereby unfairly portray the Court of Appeals' decision as a threat to administrative agency jurisdiction.

Following Heurtebise's argument to its necessary conclusion, if arbitration of a civil rights claim equals an impermissible "ousting" of the MCRC, MDRC, EEOC, etc., then civil rights claims may never be arbitrated. Therefore, virtually any terminated employee may escape a binding contract of arbitration by merely including in his or her complaint a count alleging a civil rights violation. Surely the public policy favoring arbitration of disputes would abhor such a result. In truth, excepting any class of dispute from arbitration could have a chilling effect on the availability of such an alternative forum, since a creative framing of the issues by a clever plaintiff or defendant could work to defeat arbitration time and again - much as parties are frequently impermissibly joined in lawsuits to defeat federal diversity jurisdiction.

A more realistic view of the relationship between arbitration and the administrative agencies is that they are concurrent remedies; the arbitral forum offers, in stead of a courtroom, a place for a plaintiff to have his or her claim for damages decided. The administrative

agencies simultaneously discharge a policing function. The agencies are not affected in any way by the agreement between Heurtebise and Reliable to have civil rights damage claims decided by an arbitrator rather than by a judge.

Heurtebise has created a "tempest in a teapot" to make the ramifications of the Court of Appeals' holding appear dire and alarming. In reality, no substantive constitutional or statutory rights are being abridged, and no administrative agency is being divested of its power. This Court should refuse to reverse the Court of Appeals on those grounds.

5. Case Law Cited By Heurtebise Involves Inapplicable Factual And Legal Settings And Does Not Establish Any Error By The Court of Appeals

a. Unlike In The Instant Case, The Prudential Plaintiffs Claimed They Had Been Misled Concerning The Arbitration Agreement

In a last gasp attempt to resuscitate her claim, Heurtebise latches onto *Prudential Ins Co* v *Lai*, 42 F3d 1299 (CA 9, 1994). In particular, Heurtebise claims that because the *Prudential* arbitration provision did not specifically state that discrimination claims were subject to arbitration, the provision was not enforceable.[12]

Heurtebise's dependence on *Prudential* is misplaced because of the crucial factual distinctions between the facts in that case and those of the instant case. In *Prudential*, the plaintiffs were employed as sales representatives. They claimed they were victims of sexual harassment by the supervisor. Prudential sought to compel arbitration of their claims based on the arbitration clause incorporated into the U-4 Form signed by

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12 Heurtebise also raises Title VII's legislative history which is completely irrelevant to this case. Congress' intent in passing a federal statute has no bearing on the interpretation of the Michigan legislature's intent under Elliott-Larsen.

plaintiffs when applying for their positions. This is the same form at issue in *Gilmer, supra*, and contains the same agreement "to arbitrate *any* dispute, claim or controversy that . . . is required to be arbitrated under the rules, constitutions or by-laws of the organizations with which I register." *Id* at 1301 (emphasis added).

However, unlike the plaintiff in *Gilmer, supra,* who subsequently registered with the NYSE and became subject to Rule 347 mandating arbitration of "any controversy . . . arising out of the employment or termination of employment . . . ," the *Prudential* plaintiffs subsequently registered with the National Association of Securities Dealers ("NASD") whose manual simply states that disputes "arising in connection with the business" of its members must be arbitrated. *Prudential* at 1302.

The *Prudential* plaintiffs also alleged that when they signed the U-4 Forms, they were told only that they were applying to take a test which was required for their employment by Prudential, and that they were simply directed to sign in the relevant place without being given an opportunity to read the forms. *Id* at 1303. The plaintiffs further agreed that they were never given a copy of the NASD manual which contains the actual terms of the arbitration agreement. *Id.* Thus, the *Prudential* plaintiffs claimed they (i) were unaware they signed a document containing an arbitration clause; (ii) were not on notice that they agreed to arbitrate employment disputes; and (iii) the NASD provision does not cover employment disputes. *Id.*

The Prudential *court acknowledged that employees CAN AGREE to arbitrate statutory employment claims and that the Ninth Circuit had previously compelled arbitration of an employment discrimination claim brought pursuant to Title VII. Id. See, Mago* v *Shearson Lehman Hutton, Inc,* 956 F 2d 932 (CA 9, 1992); and *Nghiem* v *NEC Electronic Inc, supra.* However, the *Prudential* court decided that it would not enforce arbitration of the claims asserted

because the NASD provision did not encompass employment-related disputes. *Prudential* at 1304.

The NASD language stands in stark contrast to the language found in *Gilmer* and the language of the Reliable Handbook in the instant case. In *Gilmer*, the comparable provision required arbitration of "any controversy . . . arising out of employment . . .". The Reliable provisions required arbitration of "any and all claims related to termination of employment . . ." Both the *Gilmer* and *Reliable* provisions are all-encompassing and undeniably include employment-related disputes, as the Court of Appeals correctly held. Pursuant to the language of both the *Gilmer* and *Reliable* arbitration procedures, no possible claim can be considered exempt, neglected, forgotten, omitted or eliminated.

The U.S. Supreme Court held that the *Gilmer* all-encompassing language — bereft of particularization, absent a description of the nature and scope of the covered claims, and missing any specification or identification of discrimination claims — satisfies the minimum requirements for enforceability of an agreement to arbitrate statutory civil rights claims. No more than this is needed. *Prudential* did not involve such all-encompassing language and there was an issue raised as to whether the employees knew even the nature of what they had signed. Accordingly, *Prudential* provides no guidance here.

Moreover, Heurtebise fails to acknowledge that other courts of appeals have upheld arbitration based on the same NASD language as was rejected by the *Prudential* court. In *Kidd* v *Equitable Life Assur Soc*, 32 F.D. 516 (CA 11, 1994), the Eleventh Circuit compelled arbitration of the Title VII race discrimination claims brought by the securities broker's former sales representatives pursuant to the same NASD language considered by the *Prudential* court. *See also*, *Benefits Communications Corp* v *Klieforth*, 642 A2d 1299 (DC App, 1994) (compelling

arbitration of a sex discrimination claim brought pursuant to the District of Columbia Human Rights Act ("Act") pursuant to NASD arbitration provision despite claimant's contention that she would be deprived of the right to jury trial because the court found no basis in the Act intending to bar voluntary agreements to arbitrate employment discrimination claims); and *Scher* v *Equitable Life Assur Soc*, 866 F Supp 776 (SD NY, 1994).

Accordingly, in view of contrary holdings by other federal courts, and the factual distinctions noted above, Heurtebise's reliance on *Prudential* does not (i) advance her case; (ii) undermine the Court of Appeals decision (iii) or raise an issue of major significance to the state's jurisprudence.

* * *

EMPLOYEE ACKNOWLEDGMENT

(Dated May 25, 1989)

I acknowledge receipt of the Reliable Business Computers, Inc. Employee Handbook. I agree to conform to the various procedures, rules and regulations of the Company, as set forth therein, and as may be promulgated by the Company in the future, and further understand that my employment and compensation can be terminated with, or without cause, and with or without notice at any time, at the option of either me or the company. I further understand that no employee, other than the President or his designee, in a duly executed written document, has any authority to enter into any agreement for employment for any specified period of time, or to make any arrangements contrary to or different from what is provided in this Handbook.

/s/ Theresa A. Heurtebise
EMPLOYEE'S SIGNATURE

Dated: *5/25/89*

Witness:
/s/ [*Illegible*]

EXCERPT FROM PLAINTIFF-APPELLANT'S SUPPLEMENTAL APPENDIX

(State of Michigan — Supreme Court)

RELIABLE BUSINESS COMPUTERS, INC.
EMPLOYEE HANDBOOK
- PAGES 64-71 -

* * *

VII
TERMINATION AND DISMISSAL

GENERAL

As indicated earlier, an employee's employment and compensation may be terminated with or without cause, with or without advance notice at any time, at the option of either the employee or the COMPANY. No employees of the COMPANY except the President, in a duly executed written document, has any authority to enter into any agreement for employment for any specified period of time, or to make any arrangement with employee contrary to, or different from the provisions set forth in this handbook. None of the policies, practices, procedures, or other matters set forth herein create any employment or personal contract, express or implied.

INTERNAL REVIEW OF EMPLOYEE DISMISSAL

An employee whose employment has been terminated by the COMPANY who disagrees with the propriety of the dismissal must request higher level review of the dismissal as a precondition to seeking and obtaining any relief outside of the COMPANY. The employee must act within ten (10) days after the date of dismissal, but has the option to employ the EMPLOYEE COMPLAINT PROCEDURES set forth in Section II, or may make formal written request to the President of the COMPANY that

the dismissal be reviewed by the COMPANY's Executive Committee (which consists of the President and three (3) of the COMPANY's other executive officers or directors). Upon receipt of the employee's formal written request for review, the President will schedule a formal review date for the employee to meet with the Executive Committee and discuss the dismissal.

The review by the Executive Committee will afford the employee an opportunity to present whatever evidence and argument the employee believes appropriate, as well as an opportunity to rebut the testimony of others as it pertains to any issues relating to the dismissal. The employee may be accompanied by a representative or legal counsel provided the employee has provided at least ten (10) days advance written notice of his intent to be represented at the review, specifying the identity, relationship, and purpose of any persons accompanying employee to the review, and may present the testimony of witnesses provided the employee has provided at least ten (10) days advance written notice of the identity of the witnesses, and a general statement relative to the matters as to which each is expected to testify. The COMPANY shall have the right to present the testimony of rebuttal and other witnesses. During the period of time between the dismissal, and the review, the employee will be considered suspended without compensation or benefits. However, if the Executive Committee determines to reinstate the employee, the COMPANY will pay the employee part or all back pay and benefits depending upon the specific facts and conditions.

Within ten (10) days after the Executive Committee completes the review, it will render a written final decision which will resolve issues of fact and provide as to whether or not the employee will be offered reinstatement of employment and if so, will specify the conditions under which the offer of reinstatement is made.

ARBITRATION OF DISMISSAL

Notwithstanding that employees are employed by the COMPANY "at will" and that an employee's employment may be terminated by the employee or the COMPANY, at any time, (without notice and without cause). An employee who has followed the internal review procedure for review by the Executive Committee, (specified above), and who is not satisfied with the results of the review and who feels compelled to seek redress from a source outside the COMPANY may challenge the propriety of the dismissal outside the COMPANY, only through arbitration as hereinafter described. Such arbitration shall be the final arena of dispute resolution and the decision of the arbitrator(s) shall be final and binding upon both the COMPANY and the employee.

BENEFITS AFTER TERMINATION OF EMPLOYMENT

Federal law requires that most employers sponsoring group health and dental plans offer terminating employees and their families the opportunity for a temporary extension of these coverages at group rates in instances where coverage under the plan would otherwise terminate. Upon termination, employees participating will be provided with an application to continue applicable group benefits as required by law, at the employee's own cost and expense.

VIII
ARBITRATION OF DISPUTES

If any dispute, matter or controversy involving claims of monetary damages and/or employment related matters should arise between an employee and the COMPANY, including, but not limited to, any and all claims relating to termination of employment (regardless of whether or not the employee has exhausted the various mandatory procedures for internal review of complaints and dismissals), then such dispute, matter or controversy shall be referred for binding arbitration under the

laws of the State of Michigan to the American Arbitration Association (hereinafter "AAA") under the rules of such AAA, to be decided by a three (3) member arbitration panel, except that the COMPANY shall have the right to select one arbitrator, the employee shall have the right to select one arbitrator, and the two arbitrators so selected shall select a third arbitrator. A decision or award of the AAA shall be accepted as final and conclusive and shall be binding upon both the employee and the COMPANY, their respective successors, heirs and legal representatives, and if necessary, appropriate orders or judgment may be entered in an appropriate court of record, incorporating and enforcing terms of any such award. The arbitration proceeding shall afford the COMPANY and the employee with opportunities to present and rebut evidence relative to the applicable issues. Nothing herein relative to arbitration, however, shall prevent either employee or COMPANY from seeking and obtaining equitable relief on a temporary or permanent basis from a court of competent jurisdiction by instituting a legal action or other court proceeding in order to protect or enforce the rights of either or to prevent irreparable harm and injury. However, the court's jurisdiction over any such matter between the COMPANY and the employee shall be expressly limited only to the equitable issues and relief sought, and all issues involving monetary damages between the COMPANY and the employee shall be determined through arbitration as described above.

L/D7 reliable.hbk

AFFIDAVIT OF THOMAS RIDDLE

(State of Michigan — Court of Appeals)

(Dated May 6, 1993)

(CHRISTINE M. RUSHTON, Plaintiff-Appellee, vs. MEIJER, INC., Defendant-Appellant — Court of Appeals Case No. ____; LC No. 92-13127-CZ; Hon. Valdemar Washington)

STATE OF MICHIGAN
COUNTY OF KENT — ss.

THOMAS RIDDLE, being first duly sworn, deposes and says that:

1. I currently hold the position of Vice President of Associate Services/Communication of Defendant Meijer, Inc., and am authorized to make this affidavit on its behalf in support of its Application for Leave to Appeal and Motion for Immediate Consideration and/or Stay.

2. I have personal knowledge of the matters recited herein and am competent to testify as to these matters.

3. Meijer, Inc., is a retail grocery and general merchandise chain with over seventy stores throughout Michigan and Ohio. The company buys and sells a substantial amount of goods which move in interstate commerce. The company also receives goods that move in interstate commerce at its Michigan warehouse facilities and ships those goods to its stores in Ohio.

4. My responsibilities include management of the Associate Services Department, which is part of the Personnel Department. My duties include administration of Step 1 of Meijer's Termination Appeal Procedure. Those duties involve conducting an independent review of the company's decision to discharge employees who file claims under the Termination Appeal Procedure and answering the employee's compalint.

5. The Meijer Associate Handbook for Meijer office, management and professional employees, became effective on November 15, 1986. This Handbook was distributed to all office, management and professional employees then employed at Meijer, Inc. Since then, the Handbook is provided to all employees at hire.

6. The company's Termination Appeal Procedure is described in the Meijer Associate Handbook. The description in the Handbook specifically advises employees that the Procedure is intended to be an exclusive, final and binding method to resolve claims relating to terminations, and that failure to use the Procedure may preclude an employee from pursuing legal rights in court or other forums.

7. A copy of the full Termination Appeal Procedure is available at any time upon request from an employee's unit manager or from the Associate Services Department. A copy of the full Procedure was attached as Exhibit 2 in support of Meijer, Inc.'s Motion For Summary Or Partial Summary Disposition. The full Termination Appeal Procedure description also specifically advises employees that it is intended to be the sole and exclusive remedy and forum for termination claims and that the award of an arbitrator under Step 2 is intended to be final and binding, and enforceable in court. It also specifically informs employees that if a court should determine that the Termination Appeals Procedure is not the sole and exclusive remedy, or that an arbitrator's award is not final and binding, then exhaustion of the Termination Appeal Procedure is intended to be a condition precedent to institution of any other proceeding in court or any other forum with respect to termination claims.

8. The arbitration hearing under Step 2 of the Termination Appeal Procedure is conducted in accordance with the Voluntary Labor Arbitration Rules of the Amer-

ican Arbitration Association (AAA), as modified by the provisions of the Termination Appeal Procedure.

9. Since its institution in 1986, 142 employees have used the Termination Appeal Procedure. In 12 of those cases, the company reversed its decision after the Step 1 investigation and offered to bring the employee back to work. There are currently 14 appeals pending at various stages of the Termination Appeal Procedure.

10. Meijer currently employs approximately 9,100 employees under the Meijer Associate Handbook for Meijer office, management and professional employees and the Termination Appeal Procedure contained in the Handbook.

11. The decision by the Genesee County Circuit Court regarding the Termination Appeals Procedure leaves Meijer, Inc. in extreme uncertainty regarding its employment policies, since its throws into question not only the finality of the decisions made under the Termination Appeals Procedure, but also the Termination Appeal Procedure itself. Meijer is now left with an ADR procedure which has been endorsed by the Court of Appeals, but invalidated by a trial court, and leaves it uncertain as to whether it or its employees can have any confidence in the continuing efficacy of the Procedure, or whether the Procedure should be completely jettisoned, and the understandings under which a substantial majority of its employees have either been employed or hired into in the last six years be abandoned. This state of affairs works substantial harm on Meijer and its ability to carry on employee relations and human resources functions.

12. The decision by the Genesee County Circuit Court regarding the Termination Appeal Procedure calls into question the finality of all breach of employment contract claims made under the Procedure during the statutory limitations period (six years) for such claims. During that time period, at least 135 such claims were

made. Fifty-six of those claims were settled with a release signed by the claimant, leaving the company potentially exposed to at least 79 de novo breach of employment contract claims in circuit court.

13. The decision by the Genesee County Circuit Court regarding the Termination Appeal Procedure also calls into question the finality of all discrimination claims made under the Procedure during the statutory limitations period (three years) for such claims. During that period, at least 41 such claims were made. Nineteen of those claims were settled with a release signed by the claimant, leaving the company potentially exposed to at least 22 de novo discrimination claims in circuit court.

Further deponent sayeth not.

/s/ Thomas Riddle

(Certification Omitted)

MICHIGAN CONSTITUTION 1963, ART 1, § 14

§ 14. Jury trials

Sec. 14. The right of trial by jury shall remain, but shall be waived in all civil cases unless demanded by one of the parties in the manner prescribed by law. In all civil cases tried by 12 jurors a verdict shall be received when 10 jurors agree.

Convention Comment

No change from Sec. 13, Article II, of the present [1908] constitution, except for the addition of a second sentence which permits verdicts in civil (not criminal) actions when at least 10 jurors agree.

-This change is consistent with the practice adopted in recent years in 23 other states. The new provision is designed to reduce costs resulting frm retrial of civil matters and to safeguard both parties involved against possibly unjust compromise verdicts or settlements.

MICHIGAN STATE FAIR EMPLOYMENT PRACTICES ACT
P.A. 1955, No. 251 — M.S.A. 17.458 *ET SEQ.*

PUBLIC AND LOCAL ACTS OF THE LEGISLATURE
OF THE STATE OF MICHIGAN
-PASSED AT THE REGULAR SESSION OF 1955-

* * *

[No. 251]

AN ACT to promote and protect the welfare of the people of this state by prevention and elimination of discriminatory employment practices and policies based upon race, color, religion, national origin or ancestry; to create a state fair employment practices commission, defining its functions, powers and duties; and for other purposes.

The People of the State of Michigan enact:

423.301 Fair employment practice act; purpose; civil right. [M.S.A. 17.458(1)]

Sec. 1. The opportunity to obtain employment without discrimination because of race, color, religion, national origin or ancestry is hereby recognized as and declared to be a civil right.

423.302 Same; definitions. [M.S.A. 17.458(2)]

Sec. 2. When used in this act:

(a) The term "person" includes 1 or more individuals, partnerships, associations, organizations, corporations, legal representatives, trustees, trustees in bankruptcy, receivers or other organized groups of persons.

(b) The term "employer" includes the state or any political or civil subdivision thereof, any person employing 3 or more persons within the state and any

person acting in the interest of an employer, directly or indirectly.

(c) The term "employee" does not include any individual employed in the domestic service of any person.

(d) The term "labor organization" includes any organization which exists for the purpose, in whole or in part, of collective bargaining or of dealing with employers concerning grievances, terms or conditions of employment, or for other mutual aid or protection in relation to employment.

(e) The term "employment agency" includes any person undertaking with or without compensation to procure opportunities to work or to procure, recruit, refer or place employees.

(f) The term "commission" means the state fair employment practices commission created by this act.

(g) The term "discriminate" includes segregate or separate.

423.303 Unfair employment practices. [M.S.A. 17.458(3)]

Sec. 3. It shall be an unfair employment practice:

(a) For any employer, because of the race, color, religion, national origin or ancestry of any individual, to refuse to hire or otherwise to discriminate against him with respect to hire, tenure, terms, conditions or privileges of employment, or any matter, directly or indirectly related to employment, except where based on a bona fide occupational qualification.

(b) For any employment agency to fail or refuse to classify properly, refer for employment or otherwise to discriminate against any individual because of his race, color, religion, national origin or ancestry, or to conduct business under a name which directly or indirectly expresses or connotes any limitation, specification or discrimination as to race, creed, ancestry or national

origin, except that any presently operating agency bearing a name which directly or indirectly expresses or connotes any such limitation, specification or discrimination may continue to use its present name: Procided, That it display under such name, wherever it appears, a statement to the effect that its services are rendered without limitation, specification or discrimination as to race, creed, color, ancestry or national origin.

(c) For any labor organization to discriminate against any individual or to limit, segregate or qualify its membership in any way which would tend to deprive such individual of employment opportunities, or would limit his employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, or would affect adversely his wages, hours or employment conditions, because of such individual's race, color, religion, national origin or ancestry.

(d) Except where based on a bona fide occupational qualification, for any employer, employment agency or labor organization, prior to employment or admission to membership, to: (1) Elicit any information concerning the race, color, religion, national origin or ancestry of an applicant for employment or membership; (2) make or keep a record of the race, color, religion, national origin or ancestry of any applicant for employment or membership; (3) use any form of application for employment, or personnel or membership blank seeking to elicit information regarding race, color, religion, national origin or ancestry; (4) print or publish or cause to be printed or published any notice or advertisement relating to employment or membership indicating any preference, limitation, specification or discrimination, based upon race, color, religion, national origin or ancestry; (5) establish, announce or follow a policy of denying or limiting, through a quota system or otherwise, employment or membership opportunities of any group because of the race, color, religion, national

origin or ancestry of such group; and (6) utilize in the recruitment or hiring of individuals any employment agency, placement service, training school or center, labor organization or any other employee-referring source known by such person to discriminate against individuals because of their race, color, religion, national origin or ancestry.

(e) For any individual seeking employment to publish or cause to be published any advertisement which specifies or in any manner indicates his race, color, religion, national origin or ancestry, or expresses a limitation or preference as to the race, color, religion, national origin or ancestry of any prospective employer.

(f) For any employer, employment agency or labor organization to discriminate in any manner against any person because he has opposed or supported any practice forbidden by this act, or because he has made a charge, testifies, assisted or participated in any manner in any investigation, proceeding or hearing under this act.

(g) For any person, whether or not an employer, employment agency, labor organization or employee, to aid, abet, incite, compel or coerce the doing of any act declared by this section to be an unfair employment practice, or to obstruct or prevent any person from complying with the provisions of this act or any order issued thereunder, or to attempt directly or indirectly to commit any act declared by this section to be an unfair employment practice.

423.304 Public contracts; nondiscrimination clauses. [M.S.A. 17.458(4)]

Sec. 4. Every contract to which the state or any of its political or civil subdivisions is a party shall contain a provision requiring the contractor and his subcontractors not to discriminate against any employee or applicant for employment, to be employed in the

performance of such contract, with respect to his hire, tenure, terms, conditions or privileges of employment, or any matter directly or indirectly related to employment, because of his race, color, religion, national origin or ancestry. Breach of this covenant may be regarded as a material breach of the contract.

423.305 Fair employment practice commission; bipartisan membership, appointment, vacancies, quorum, removal, compensation, expenses, policies. [M.S.A. 17.458(5)]

Sec. 5. (a) There is hereby created a state fair employment practices commission, to consist of 6 members to be appointed by the governor, by and with the advice and consent of the senate. The commission shall annually elect its own chairman.

(b) Members of the commission shall hold office for terms of 3 years, except that of those first appointed, the terms shall expire as follows: Two on December 31, 1956; 2 on December 31, 1957; and 2 on December 31, 1958; Provided, That the members shall serve until the appointment and qualification of their successors. Vacancies shall be filled for the unexpired term in the same manner as is provided for appointment in the first instance. Not more than 3 members of the commission shall be of the same political party, the remainder shall be of the opposite major party.

Four members of the commission shall constitute a quorum for the purpose of conducting the business thereof. A vacancy in the commission shall not impair the right of the remaining members to exercise all the powers of the commission.

Any member of the commission may be removed by the governor for misfeasance, malfeasance or nonfeasance in office after being given a written statement of the charges and an opportunity to be heard thereon. The members of the commission shall be entitled to per

diem of $25.00 for time actually spent and their expenses actually and necessarily incurred by them in the performance of their duties.

All salaries and expenses authorized by this act shall be paid in the same manner as the salaries and expenses of other state officers and employees are paid. The commission shall not provide for the payment of salaries and for the incurring of expenses beyond the appropriation made therefor by the legislature.

(c) The commission shall formulate policies to effectuate the purposes of this act and may make recommendations to agencies and officers of the state government in aid of such policies and purposes.

423.306 Same; powers and duties. [M.S.A. 17.458(6)]

Sec. 6. The commission shall have the following powers and duties:

Offices.

(a) To establish and maintain a principal office in the city of Lansing and such other offices within the state as it may deem necessary;

Meetings.

(b) To meet and function at any place within the state;

Attorneys, hearing examiners, other employees.

(c) To appoint such attorneys, hearing examiners and other employees and agents as it may deem necessary;

Rules.

(d) To adopt, promulgate, amend and rescind rules and regulations to effectuate the provisions of this act and the policies and practices of the commission in connection therewith. All rules, regulations, policies and practices of the commission shall be adopted in accordance with and shall comply with Act No. 88 of the Public Acts of 1943, as amended, being sections 24.71 to

24.82, inclusive, of the Compiled Laws of 1948, and Act No. 197 of the Public Acts of 1952, as amended, being sections 24.101 to 24.110, inclusive, of the Compiled Laws of 1948;

Investigations.

(e) To receive, investigate and pass upon charges of unfair employment practices;

Hearings, witnesses, subpoenas.

(f) To hold hearings, administer oaths, take testimony under oath and the commission and any person under investigation shall have the right to request in writing appearance and testimony of witnesses, request in writing the production of books and records, and upon the refusal of witnesses to appear and/or testify, or on the refusal of persons to submit their books and records after request therefor, the commission and persons under investigation shall have the right to apply to the circuit court of the state of Michigan in any county wherein the alleged unfair employment practice, which is the subject of the commission's inquiry, was committed, or wherein any potential respondent subject to investigation, resides or transacts business, for a subpoena or subpoena duces tecum. Such circuit courts shall issue such subpoenas upon reasonable grounds being shown for the necessity of the issuance of such subpoenas;

Volunteers.

(g) To utilize voluntary and uncompensated services of private individuals and organizations as may, from time to time, be offered and needed;

Advisory agencies.

(h) To create such advisory agencies, local or statewide, as will aid in effectuating the purposes of this act. The commission may itself recommend formal or informal programs of education, or it may empower these agencies to: (1) Study the problems of discrimination in all or specific fields of human relationships when

based on race, color, religion, national origin or ancestry; and (2) foster through community effort or otherwise good will among the groups and elements of the population of the state. Such agencies may make recommendations to the commission for the development of policies and procedure in general;

Publications.

(i) To issue such publications and such results of investigations and research as, in its judgment, will tend to promote good will and minimize or eliminate discrimination because of race, color, religion, national origin or ancestry;

Annual survey.

(j) To make at least annually a survey of the existence and effect of discrimination because of race, religious creed, national origin or ancestry on the enjoyment of civil rights by persons within the state; and

Reports, recommendations.

(k) From time to time, but not less than once a year, to report to the legislature and the governor, describing the investigations, proceedings and hearings it has conducted and their outcome, the decisions it has rendered and the other work performed by it, which report shall include a copy of the survey prescribed in subdivision (j) of this section, and shall include the recommendation of the commission as to remedial action, legislative and otherwise.

423.307 Prevention of unfair employment practices; persuasion, conciliation. [M.S.A. 17.458(7)]

Sec. 7. (a) The commission is empowered and directed, as hereinafter provided, to prevent any person from engaging in unfair employment practices. Provided, That before instituting the formal hearing authorized by this section it shall attempt, by informal methods of

persuasion and conciliation, to induce compliance with this act.

Complaint; contents.

(b) Any individual claiming to be aggrieved by an alleged unlawful employment practice may, by himself or his agent, make, sign and file with the board, within 90 days fter the alleged act of discrimination, a verified complaint in writing, which shall state the name and address of the person, employer, labor organization or employment agency alleged to have committed the unlawful employment practice complained of, and which shall set forth the particulars thereof and contain such other information as may be required by the board. Any employer whose employees, or some of whom, refuse or threaten to refuse to cooperate with the provisions of this act, may file with the board a verified complaint asking for assistance by conciliation or other remedial action.

Same; filing, investigation.

(c) After the filing of any complaint setting forth unlawful employment practice, the chairman of the board shall designate 1 of the commission members to make, with the assistance of the commission's staff, prompt investigation in connection therewith; and if such member shall determine after such investigation that probable cause exists for crediting the allegations of the complaint, he shall immediately endeavor to eliminate the unlawful employment practice complained of by conference, conciliation and persuasion. The members of the commission and its staff shall not disclose what has transpired in the course of such endeavors.

Same; service, notice of hearing.

(d) Whenever a charge has been made by any individual hereinafter referred to as the complainant, that any employer, employment agency, labor organization or person, hereinafter referred to as the respondent, has engaged in or is engaging in any unfair employment

practice, the commission shall have the power to issue and cause to be served upon such respondent a complaint stating the charges in that respect and containing a notice of hearing before the commission or a member thereof, or a hearing examiner, at a place therein fixed to be held not less than 10 days after the service of said complaint.

Same; amendment, answer.

(e) Any such complaint may be amended by the commission or a member thereof or its agents conducting the hearing, at any time prior to the issuance of an order based thereon. The respondent shall have the right to file an answer to the original and amended complaint and to appear at such hearing in person or by attorney or otherwise to examine and cross-examine witnesses and the complainant.

Same; parties, interveners.

(f) The complainant shall be a party to the proceeding and, in the discretion of a member conducting the hearing or of the commission, any person may be allowed to intervene therein.

Same; testimony, criterion for employment.

(g) The testimony taken at the hearing shall be under oath and shall be reduced to writing and filed with the commission. Thereafter, in its discretion, the commission upon notice may take further testimony or hear argument which may tend to prove the existence of a predetermined pattern of employment or membership. Provided, That nothing herein contained shall be construed to authorize or require any employer or labor organization to employ or admit applicants for employment or membership in the proportion which their race, color, religion, national origin or ancestry bears to the total population, or in accordance with any criterion other than the individual qualifications of the applicant.

Same; finding of commission, order to cease, declaratory order.

(h) If, upon the preponderance of the evidence on the record considered as a whole, the commission shall determine that the respondent has engaged in or is engaging in any unfair employment practice, the commission shall state its findings of fact and shall issue and cause to be served on such respondent an order requiring such respondent to cease and desist from such unfair employment practice and to take such further affirmative or other action as will effectuate the purposes of this act, including, but not limited to, hiring, reinstatement or upgrading of employees with or without back pay, or admission or restoration to union membership, including a requirement for reports of the manner of compliance. Upon the submission of such reports of compliance, the commission may issue a declaratory order stating that respondent has ceased to engage in unfair employment practices.

Same; order of dismissal; copies.

(i) If the commission shall find that no probable cause exists for crediting the charges or if, upon all the evidence, the commission shall find that a respondent has not engaged in any unfair employment practice, it shall state its findings of fact and shall issue and cause to be served on the complainant an order dismissing the said complaint as to such respondent. A copy of the order shall be delivered in all cases to the attorney general and such other public officers as the commission deems proper.

Same; modification of orders.

(j) Until a transcript of the record in a case shall be filed in a court as hereinafter provided, the commission may at any time, upon reasonable notice and in such manner as it shall deem proper, modify or set aside in whole or in part any findings or order made by it.

423.308 Final order; review by circuit court, jurisdiction. [M.S.A. 17.458(8)]

Sec. 8. (a) Any complainant, intervener or respondent claiming to be aggrieved by a final order of the commission, including a refusal to issue a complaint, may appeal to the circuit court of the state of Michigan within any county wherein the unfair employment practice, which is the subject of the commission's order, was committed, or wherein any respondent required in the order to cease and desist from an unfair employment practice, or to take other affirmative action, resides or transacts business and such appeal shall be tried de novo before said circuit court.

Petition; transcript of record; temporary relief.

(b) Such proceeding shall be initiated by the filing of a petition in such court and the service of a copy of the said petition upon the commission and upon all parties who appeared before the commission. Thereupon, the commission shall file a transcript of the record upon the hearing before it. The court shall have jurisdiction of the proceeding and of the questions determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony and proceedings set forth in such transcript an order enforcing, modifying and enforcing as so modified, or setting aside in whole or in part, the order of the commission.

Objections reviewable.

(c) An objection that has not been urged before the commission shall not be considered by the court, unless the failure or neglect to urge such objection shall be excused because of reasonable grounds shown.

Motion to remit case to commission.

(d) Any party may move the court to remit the case to the commission in the interests of justice for the purpose of adducing additional specified and material evi-

dence and seeking findings thereon. Provided, That he shows reasonable grounds for the failure to adduce such evidence before the commission.

Jurisdiction of court.

(e) The jurisdiction of the court shall be exclusive and its judgment and order shall be final, subject to appellate review as provided by law.

Petition, hearing, transcript of record.

(f) The commission's copy of the testimony shall be available at all reasonable times to all parties without cost for examination and for the purposes of judicial review of the order of the commission. The petition shall be heard on the transcript of the record without requirement of printing.

Commission, appearance in court.

(g) The commission may appear in court by the attorney general or such assistants of the attorney general as may be assigned to the commission.

Petition for enforcement of commission's unappealed order.

(h) If no proceeding to obtain judicial review is instituted by a complainant, intervener or respondent within 30 days from the service of an order of the commission pursuant to section 7 (h) hereof, the commission may obtain a decree of the court for the enforcement of such order upon showing that respondent is subject to the commission's jurisdiction and resides or transacts business within the county in which the petition for enforcement is brought.

423.309 Posted notice of act; violation. [M.S.A. 17.458(9)]

Sec. 9. Every employer, employment agency and labor union, subject to this act, shall post in a conspicuous place or places on his premises a notice to be prepared or approved by the commission which shall set forth excerpts of this act and such other relevant infor-

mation which the commission deems necessary to explain the act. Any employer, employment agency or labor union refusing to comply with the provisions of this section shall be punished by a fine of not less than $100.00 nor more than $500.00.

423.310 Construction of act. [M.S.A. 17.458(10)]

Sec. 10. (a) The provisions of this act shall be construed liberally for the accomplishment of the purposes thereof, and any law inconsistent with any provision hereof shall not apply. Nothing contained in this act shall be deemed to repeal any of the provisions of any law of this state relating to discrimination because of race, color, religion, national origin or ancestry.

Employers; hiring and firing; labor organizations, membership.

(b) This act shall not be construed as limiting the rights of employers to hire and fire, and of labor organizations to determine their membership, as long as such rights are not exercised in violation of the provisions of this act.

Jury trial.

(c) This act shall be so construed that section 13 of article 2 of the constitution of the state of Michigan shall apply in any circuit court to any case or action arising under this act and every party or respondent in such case or action shall be deemed to have demanded the rights reserved to him under said section 13 of article 2 unless, subsequent to his appearance in such case or action, such demand is waived in writing or in open court.

423.311 Short title of act. [M.S.A. 17.458(11)]

Sec. 11. This act may be cited as the "Michigan state fair employment practices act." Approved June 29, 1955.

ELLIOTT-LARSEN CIVIL RIGHTS ACT

Act No. 453, Public Acts of 1976
Approved by Governor January 13, 1977
As amended by: Act 162, Public Acts of 1977;
Act 153, Public Acts of 1978; Act 446, Public Acts of 1978;
Act 93, Public Acts of 1980; Act 170, Public Acts of 1980;
Act 202, Public Acts of 1980; Act 45, Public Acts of 1982;
Act 512, Public Acts of 1982; Act 11, Public Acts of 1991

AN ACT to define civil rights; to prohibit discriminatory practices, policies, and customs in the exercise of those rights based upon religion, race, color, national origin, age, sex, height, weight, or marital status; to preserve the confidentiality of records regarding arrest, detention, or other disposition in which a conviction does not result; to prescribe the powers and duties of the civil rights commission and the department of civil rights; to provide remedies and penalties; and to repeal certain acts and parts of acts.

The People of the State of Michigan enact:

ARTICLE 1

Sec. 101. This act shall be known and may be cited as the "Elliott-Larsen Civil Rights Act."

Sec. 102. (1) The opportunity to obtain employment, housing and other real estate, and the full and equal utilization of public accommodations, public service, and educational facilities without discrimination because of religion, race, color, national origin, age, sex, height, weight, or marital status as prohibited by this act, is recognized and declared to be a civil right.

(2) This section shall not be construed to prevent an individual from bringing or continuing an action arising out of sex discrimination before July 18, 1980 which action is based on conduct similar to or identical to harassment.

Sec. 103. As used in this act:

(a) "Age" means chronological age except as otherwise provided by law.

(b) "Commission" means the civil rights commission established by section 29 of article 5 of the state constitution of 1963.

(c) "Commissioner" means a member of the commission.

(d) "Department" means the department of civil rights or its employees.

(e) "National origin" includes the national origin of an ancestor.

(f) "Person" means an individual, agent, association, corporation, joint apprenticeship committee, joint stock company, labor organization, legal representative, mutual company, partnership, receiver, trust, trustee in bankruptcy, unincorporated organization, the state or a political subdivision of the state or an agency of the state, or any other legal or commercial entity.

(g) "Political subdivision" means a county, city, village, township, school district, or special district or authority of the state.

(h) Discrimination because of sex includes sexual harassment which means unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct or communication of a sexual nature when:

(i) Submission to such conduct or communication is made a term or condition either explicitly or implicitly to obtain employment, public accommodations or public services, education, or housing.

(ii) Submission to or rejection of such conduct or communication by an individual is used as a factor in decisions affecting such individual's

employment, public accommodations or public services, education, or housing.

(iii) Such conduct or communication has the purpose or effect of substantially interfering with an individual's employment, public accommodations or public services, education, or housing, or creating an intimidating, hostile, or offensive employment, public accommodations, public services, educational, or housing environment.

ARTICLE 2

Sec. 201. As used in this article:

(a) "Employer" means a person who has 1 or more employees, and includes an agent of that person.

(b) "Employment agency" means a person regularly undertaking with or without compensation to procure, refer, recruit, or place an employee for an employer or to procure, refer, recruit, or place for an employer or person the opportunity to work for an employer and includes an agent of that person.

(c) "Labor organization" includes:

(i) An organization of any kind, an agency or employee representation committee, group, association, or plan in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours, or other terms or conditions of employment.

(ii) A conference, general committee, joint or system board, or joint council which is subordinated to a national or international labor organization.

(iii) An agent of a labor organization.

(d) "Sex" includes, but is not limited to, pregnancy, childbirth, or a medical condition related to pregnancy or childbirth that does not include nontherapeutic abortion not intended to save the life of the mother.

Sec. 202. (1) An employer shall not:

(a) Fail or refuse to hire, or recruit, or discharge, or otherwise discriminate against an individual with respect to employment, compensation, or a term, condition, or privilege of employment, because of religion, race, color, national origin, age, sex, height, weight, or marital status.

(b) Limit, segregate, or classify an employee or applicant for employment in a way which deprives or tends to deprive the employee or applicant of an employment opportunity, or otherwise adversely affects the status of an employee or applicant because of religion, race, color, national origin, age, sex, height, weight, or marital status.

(c) Segregate, classify, or otherwise discriminate against a person on the basis of sex with respect to a term, condition, or privilege of employment, including a benefit plan or system.

(d) Until January 1, 1994, require an employee of an institution of higher education who is serving under a contract of unlimited tenure, or similar arrangement providing for unlimited tenure, to retire from employment on the basis of the employee's age. As used in this subdivision, "institution of higher education" means a public or private university, college, community college, or junior college located in this state.

(2) This section shall not be construed to prohibit the establishment or implementation of a bona fide retirement policy or system which is not a subterfuge to evade the purposes of this section.

(3) This section shall not apply to the employment of an individual by his or her parent, spouse, or child.

Sec. 203. An employment agency shall not fail or refuse to procure, refer, recruit, or place for employment, or otherwise discriminate against, an individual because of religion, race, color, national origin, age, sex, height, weight, or marital status; or classify or refer for employment an individual on the basis of religion, race, color, national origin, age, sex, height, weight, or marital status.

Sec. 204. A labor organization shall not:

(a) Exclude or expel from membership, or otherwise discriminate against, a member or applicant for membership because of religion, race, color, national origin, age, sex, height, weight, or marital status.

(b) Limit, segregate, or classify membership or applicants for membership, or classify or fail or refuse to refer for employment an individual in a way which would deprive or tend to deprive that individual of an employment opportunity, or which would limit an employment opportunity, or which would adversely affect wages, hours, or employment conditions, or otherwise adversely affect the status of an employee or an applicant for employment, because of religion, race, color, national origin, age, sex, height, weight, or marital status.

(c) Cause or attempt to cause an employer to violate this article.

(d) Fail to fairly and adequately represent a member in a grievance process because of religion, race, color, national origin, age, sex, height, weight, or marital status.

Sec. 205. An employer, labor organization, or joint labor-management committee controlling an apprenticeship, on the job, or other training or retraining program, shall not discriminate against an individual because of religion, race, color, national origin, age, sex, height, weight, or marital status, in admission to, or employ-

ment or continuation in, a program established to provide apprenticeship on the job, or other training or retraining.

Sec. 205a. An employer, employment agency, or labor organization, other than a law enforcement agency of the state or a political subdivision of the state, shall not in connection with an application for employment, personnel, or membership, or in connection with the terms, conditions, or privileges of employment, personnel, or membership request, make, or maintain a record of information regarding an arrest, detention, or disposition of a violation of law in which a conviction did not result. A person shall not be held guilty of perjury or otherwise giving a false statement by failing to recite or acknowledge information the person has a civil right to withhold by this section. This section shall not apply to information relative to a felony charge before conviction or dismissal.

Sec. 206. (1) An employer, labor organization, or employment agency shall not print, circulate, post, mail, or otherwise cause to be published a statement, advertisement, notice, or sign relating to employment by the employer, or relating to membership in or a classification or referral for employment by the labor organization, or relating to a classification or referral for employment by the employment agency, which indicates a preference, limitation, specification, or discrimination, based on religion, race, color, national origin, age, sex, height, weight, or marital status.

(2) Except as permitted by rules promulgated by the commission or by applicable federal law, an employer or employment agency shall not:

(a) Make or use a written or oral inquiry or form of application that elicits or attempts to elicit information concerning the religion, race, color, national origin, age, sex, height, weight, or marital status of a prospective employee.

(b) Make or keep a record of information described in subdivision (a) or to disclose that information.

(c) Make or use a written or oral inquiry or form of application that expresses a preference, limitation, specification, or discrimination based on religion, race, color, national origin, age, sex, height, weight, or marital status of a prospective employee.

Sec. 207. An individual seeking employment shall not publish or cause to be published a notice or advertisement that specifies or indicates the individual's religion, race, color, national origin, age, sex, height, weight, or marital status, or expresses a preference, specification, limitation, or discrimination as to the religion, race, color, national origin, age, height, weight, sex, or marital status of a prospective employer.

Sec. 208. A person subject to this article may apply to the commission for an exemption on the basis that religion, national origin, age, height, weight, or sex is a bona fide occupational qualification reasonably necessary to the normal operation of the business or enterprise. Upon sufficient showing, the commission may grant an exemption to the appropriate section of this article. An employer may have a bona fide occupational qualification on the basis of religion, national origin, sex, age, or marital status, height and weight without obtaining prior exemption from the commission, provided that an employer who does not obtain an exemption shall have the burden of establishing that the qualification is reasonably necessary to the normal operation of the business.

Sec. 209. A contract to which the state, a political subdivision, or an agency thereof is a party shall contain a covenant by the contractor and his subcontractors not to discriminate against an employee or applicant for employment with respect to hire, tenure, terms, conditions, or privileges of employment, or a matter directly or indirectly related to employment,

because of race, color, religion, national origin, age, sex, height, weight, or marital status. Breach of this covenant may be regarded as a material breach of the contract.

Sec. 210. A person subject to this article may adopt and carry out a plan to eliminate present effects of past discriminatory practices or assure equal opportunity with respect to religion, race, color, national origin, or sex if the plan is filed with the commission under rules of the commission and the commission approves the plan.

Sec. 211. Notwithstanding any other provision of this article, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions or privileges of employment pursuant to a bona fide seniority or merit system.

ARTICLE 3

Sec. 301. As used in this article:

(a) "Place of public accommodation" means a business, or an educational, refreshment, entertainment, recreation, health, or transportation facility, or institution of any kind, whether licensed or not, whose goods, services, facilities, privileges, advantages, or accommodations are extended, offered, sold, or otherwise made available to the public.

(b) "Public service" means a public facility, department, agency, board, or commission, owned, operated, or managed by or on behalf of the state, a political subdivision, or an agency thereof, or a tax exempt private agency established to provide service to the public.

Sec. 302. Except where permitted by law, a person shall not:

(a) Deny an individual the full and equal enjoyment of the goods, services, facilities, privileges, advantages,

or accommodations of a place of public accommodation or public service because of religion, race, color, national origin, age, sex, or marital status.

(b) Print, circulate, post, mail, or otherwise cause to be published a statement, advertisement, notice, or sign which indicates that the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of a place of public accommodation or public service will be refused, withheld from, or denied an individual because of religion, race, color, national origin, age, sex, or marital status, or that an individual's patronage of or presence at a place of public accommodation is objectionable, unwelcome, unacceptable, or undesirable because of religion, race, color, national origin, age, sex, or marital status.

Sec. 303. This article shall not apply to a private club, or other establishment not in fact open to the public, except to the extent that the goods, services, facilities, privileges, advantages, or accommodations of the private club or establishment are made available to the customers or patrons of another establishment that is a place of public accommodation or is licensed by the state under Act No. 8 of the Public Acts of 1933, being sections 436.1 through 436.58 of the Michigan Compiled Laws.

ARTICLE 4

Sec. 401. As used in this article, "educational institution" means a public or private institution, or a separate school or department thereof, and includes an academy, college, elementary or secondary school, extension course, kindergarten, nursery, local school system, university, or a business, nursing, professional, secretarial, technical, or vocational school; and includes an agent of an educational institution.

Sec. 402. (1) An educational institution shall not:

(a) Discriminate against an individual in the full utilization of or benefit from the institution, or the services, activities, or programs provided by the institution because of religion, race, color, national origin, or sex.

(b) Exclude, expel, limit, or otherwise discriminate against an individual seeking admission as a student or an individual enrolled as a student in the terms, conditions, or privileges of the institution, because of religion, race, color, national origin, or sex.

(c) For purposes of admission only, make or use a written or oral inquiry or form of application that elicits or attempts to elicit information concerning the religion, race, color, national origin, age, sex, or marital status of a person, except as permitted by rule of the commission or as required by federal law, rule, or regulation, or pursuant to an affirmative action program.

(d) Print or publish or cause to be printed or published a catalog, notice, or advertisement indicating a preference, limitation, specification, or discrimination based on the religion, race, color, national origin, or sex of an applicant for admission to the educational institution.

(e) Announce or follow a policy of denial or limitation through a quota or otherwise of educational opportunities of a group or its members because of religion, race, color, national origin, or sex.

(f) Encourage or condone legally required discrimination against an individual on the basis of race or color by knowingly making or maintaining after April 1, 1984, an investment in an organization operating in the republic of South Africa. This subdivision shall not apply to a private educational institution.

(g) Encourage or condone religious discrimination or ethnic discrimination by knowingly making or maintaining after February 1, 1983, an investment in an orga-

nization operating in the Union of Soviet Socialist Republics.

(2) The department shall compile, from information obtained from the United States department of commerce, a current register of organizations operating in the republic of South Africa and the Union of Soviet Socialist Republics. The department shall make the register available, upon request, to a person, board, or commission for a reasonable charge.

(3) As used in this section:

(a) "Investment" means money placed in shares of stock and other equity interests. Investment does not include an evidence of indebtedness arising from a transfer of direct obligations of, or obligations that are fully guaranteed as to principal and interest by, the United States or any agency thereof, that a bank is obligated to repurchase or a bank deposit made in the ordinary course of business.

(b) "Organization" means a United States firm, or a subsidiary or affiliate of a United States firm, as determined by the United States department of commerce.

Sec. 403. The provisions of section 402 related to religion shall not apply to a religious educational institution or an educational institution operated, supervised, or controlled by a religious institution or organization which limits admission or gives preference to an applicant of the same religion.

Sec. 404. The provisions of section 402 relating to sex shall not apply to a private educational institution not exempt under section 403, which now or hereafter provides an education to persons of 1 sex.

ARTICLE 5

Sec. 501. As used in this article:

(a) "Real property" includes a building, structure, mobile home, real estate, land, mobile home park, trailer park, tenement, leasehold, or an interest in a real estate cooperative or condominium.

(b) "Real estate transaction" means the sale, exchange, rental, or lease of real property, or an interest therein.

(c) "Housing accommodation" includes improved or unimproved real property, or a part thereof, which is used or occupied, or is intended, arranged, or designed to be used or occupied, as the home or residence of 1 or more persons.

(d) "Real estate broker or salesman" means a person, whether licensed or not, who, for or with the expectation of receiving a consideration, lists, sells, purchases, exchanges, rents, or leases real property; who negotiates or attempts to negotiate any of those activities; who holds himself out as engaged in those activities; who negotiates or attempts to negotiate a loan secured or to be secured by a mortgage or other encumbrance upon real property; who is engaged in the business of listing real property in a publication; or a person employed by or acting on behalf of a real estate broker or salesman.

Sec. 502. (1) A person engaging in a real estate transaction, or a real estate broker or salesman, shall not on the basis of religion, race, color, national origin, age, sex, or marital status of a person or a person residing with that person:

(a) Refuse to engage in a real estate transaction with a person.

(b) Discriminate against a person in the terms, conditions, or privileges of a real estate transaction or in the furnishing of facilities or services in connection therewith.

(c) Refuse to receive from a person or transmit to a person a bona fide offer to engage in a real estate transaction.

(d) Refuse to negotiate for a real estate transaction with a person.

(e) Represent to a person that real property is not available for inspection, sale, rental, or lease when in fact it is so available, or knowingly fail to bring a property listing to a person's attention, or refuse to permit a person to inspect real property.

(f) Print, circulate, post, mail, or otherwise cause to be published a statement, advertisement, notice, or sign, or use a form of application for a real estate transaction, or make a record of inquiry in connection with a prospective real estate transaction, which indicates, directly or indirectly, an intent to make a preference, limitation, specification, or discrimination with respect thereto.

(g) Offer, solicit, accept, use, or retain a listing of real property with the understanding that a person may be discriminated against in a real estate transaction or in the furnishing of facilities or services in connection therewith.

(2) This section is subject to section 503.

Sec. 503. (1) Section 502 shall not apply: (a) to the rental of a housing accommodation in a building which contains housing accommodations for not more than 2 families living independently of each other if the owner or a member of the owner's immediate family resides in 1 of the housing accommodations, or to the rental of a room or rooms in a single family dwelling by a person if the lessor or a member of the lessor's immediate family resides therein.

(b) To the rental of a housing accommodation for not more than 12 months by the owner or lessor where it was occupied by him and maintained as his home for

at least 3 months immediately preceding occupancy by the tenant and is temporarily vacated while maintaining legal residence.

(c) With respect to the age provision only, to the sale, rental, or lease of housing accommodations meeting the requirements of federal, state, or local housing programs for senior citizens, or accommodations otherwise intended, advertised, designed or operated, bona fide, for the purpose of providing housing accommodations for persons 50 years of age or older.

(2) As used in subsection (1), "immediate family" means a spouse, parent, child, or sibling.

(3) Information relative to the marital status of an individual may be obtained when necessary for the preparation of a deed or other instrument of conveyance.

Sec. 504. (1) A person to whom application is made for financial assistance or financing in connection with a real estate transaction or in connection with the construction, rehabilitation, repair, maintenance, or improvement of real property, or a representative of that person, shall not:

(a) Discriminate against the applicant because of the religion, race, color, national origin, age, sex, or marital status of the applicant or a person residing with the applicant.

(b) Use a form of application for financial assistance or financing or make or keep a record or inquiry in connection with an application for financial assistance or financing which indicates, directly or indirectly, a preference, limitation, specification, or discrimination as to the religion, race, color, national origin, age, sex, or marital status of the applicant or a person residing with the applicant.

(2) Subsection (1)(b) shall not apply to a form of application for financial assistance prescribed for the

use of a lender regulated as a mortgage under the national housing act, as amended, being 12 U.S.C. sections 1701 to 1750g (Supp. 1973) or by a regulatory board or officer acting under the statutory authority of this state or the United States.

Sec. 505. (1) A condition, restriction, or prohibition, including a right of entry or possibility of reverter, which directly or indirectly limits the use or occupancy of real property on the basis of religion, race, color, national origin, age, sex, or marital status is void, except a limitation of use as provided in Section 503(1)(c) or on the basis of religion relating to real property held by a religious institution or organization, or by a religious or charitable organization operated, supervised, or controlled by a religious institution or organization, and used for religious or charitable purposes.

(2) A person shall not insert in a written instrument relating to real property a provision that is void under this section or honor such a provision in the chain of title.

Sec. 506. A person shall not represent, for the purpose of inducing a real estate transaction from which the person may benefit financially, that a change has occurred or will or may occur in the composition with respect to religion, race, color, national origin, age, sex, or marital status of the owners or occupants in the block, neighborhood, or area in which the real property is located, or represent that this change will or may result in the lowering of property values, an increase in criminal or antisocial behavior, or a decline in the quality of schools in the block, neighborhood, or area in which the real property is located.

Sec. 507. A person subject to this article may adopt and carry out a plan to eliminate present effects of past discriminatory practices or assure equal opportunity with respect to religion, race, color, national origin, or

sex if the plan is filed with the commission under rules of the commission and the commission approves the plan.

ARTICLE 6

Sec. 601. (1) The commission shall:

(a) Maintain a principal office in the city of Lansing and other offices within the state as it considers necessary.

(b) Meet and exercise its powers at any place within the state.

(c) Appoint an executive director who shall be the chief executive officer of the department and exempt from civil service, and appoint necessary hearing examiners.

(d) Accept public grants, private gifts, bequests, or other amounts or payments.

(e) Prepare annually a comprehensive written report to the governor. The report may contain recommendations adopted by the commission for legislative or other action necessary to effectuate the purposes and policies of this act.

(f) Promulgate, amend, or repeal rules to carry out this act pursuant to Act No. 306 of the Public Acts of 1969, as amended, being sections 24.201 to 24.315 of the Michigan Compiled Laws.

(g) Request the services of a department or agency of the state or a political subdivision of the state.

(h) Promote and cooperate with a public or governmental agency as in the commission's judgment will aid in effectuating the act and the state constitution of 1963.

(i) Establish and promulgate rules governing its relationship with local commissions, and establish criteria

for certifying local commissions for the deferring of complaints.

(2) The commission may hold hearings, administer oaths, issue preliminary notices to witnesses to appear, compel through court authorization the attendance of witnesses and the production for examination of books, papers, or other records relating to matters before the commission, take the testimony of a person under oath, and issue appropriate orders. The commission may promulgate rules as to the issuance of preliminary notices to appear.

(3) A majority of the members of the commission constitutes a quorum. A majority of the members is required to take action on matters not of a ministerial nature, but a majority of a quorum may deal with ministerial matters. A vacancy in the commission shall not impair the right of the remaining members to exercise the powers of the commission. The members of the commission shall receive a per diem compensation and shall be reimbursed for the actual and necessary expenses incurred in the performance of their duties. The per diem compensation of the commission and the schedule for reimbursement of the expenses shall be established annually by the legislature.

(4) The business which the commission may perform shall be conducted at a public meeting of the commission held in compliance with Act No. 267 of the Public Acts of 1976, being sections 15.261 to 15.275 of the Michigan Compiled Laws. Public notice of the time, date, and place of the meeting shall be given in the manner required by Act No. 267 of the Public Acts of 1976.

(5) A writing prepared, owned, used, in the possession of, or retained by the commission in the performance of an official function shall be made available to the public in compliance with Act No. 442 of the Public

Acts of 1976, being sections 15.231 to 15.246 of the Michigan Compiled Laws.

Sec. 602. The department shall:

(a) Be responsible to the executive director, who shall be the principal executive officer of the department and shall be responsible for executing the policies of the commission.

(b) Appoint necessary employees and agents and fix their compensation in accordance with civil service rules. The attorney general shall appear for and represent the department or the commission in a court having jurisdiction of a matter under this act.

(c) Receive, initiate, investigate, conciliate, adjust, dispose of, issue charges, and hold hearings on complaints alleging a violation of this act, and approve or disapprove plans to correct past discriminatory practices which have caused or resulted in a denial of equal opportunity with respect to groups or persons protected by this act.

(d) Require answers to interrogatories, order the submission of books, papers, records, and other materials pertinent to a complaint, and require the attendance of witnesses, administer oaths, take testimony, and compel, through court authorization, compliance with its orders or an order of the commission.

(e) Cooperate or contract with persons and state, local, and other agencies, both public and private, including agencies, of the federal government and of other states.

(f) Monitor contracts to insure compliance by a contractor or a subcontractor with a covenant entered into pursuant to section 210.

Sec. 603. At any time after a complaint is filed, the department may file a petition in the circuit court for the county in which the subject of the complaint

occurs, or for the county in which a respondent resides or transacts business, seeking appropriate temporary relief against the respondent, pending final determination of proceedings under this section, including an order or decree restraining the respondent from doing or procuring an act tending to render ineffectual an order the commission may enter with respect to the complaint. If the complaint alleges a violation of article 5, upon the filing of the petition the department shall file for the record a notice of pendency of the action. The court may grant temporary relief or a restraining order as it deems just and proper, but the relief or order shall not extend beyond 5 days except by consent of the respondent, or after hearing upon notice to the respondent and a finding by the court that there is reasonable cause to believe that the respondent has engaged in a discriminatory practice.

Sec. 604. If the commission, after a hearing on a charge issued by the department, determines that the respondent has not engaged in a discriminatory practice prohibited by this act, the commission shall state its findings of fact and conclusions of law and shall issue a final order dismissing the complaint. The commission shall furnish a copy of the order to the claimant, the respondent, the attorney general, and other public officers and persons as the commission deems proper.

Sec. 605. (1) If the commission, after a hearing on a charge issued by the department, determines that the respondent has violated this act, the commission shall state its findings of fact and conclusions of law and shall issue a final order requiring the respondent to cease and desist from the discriminatory practice and to take such other action as it deems necessary to secure equal enjoyment and protection of civil rights. If at a hearing on a charge, a pattern or practice of discrimination prohibited by this act appears in the evidence, the commission may, upon its own motion or on

motion of the claimant, amend the pleadings to conform to the proofs, make findings, and issue an order based on those findings. A copy of the order shall be delivered to the respondent, the claimant, the attorney general, and to other public officers and persons as the commission deems proper.

(2) Action ordered under this section may include, but is not limited to:

(a) Hiring, reinstatement, or upgrading of employees with or without back pay.

(b) Admission or restoration of individuals to labor organization membership, admission to or participation in a guidance program, apprenticeship training program, on the job training program, or other occupational training or retraining program, with the utilization of objective criteria in the admission of persons to those programs.

(c) Admission of persons to a public accommodation or an educational institution.

(d) Sale, exchange, lease, rental, assignment, or sublease of real property to a person.

(e) Extension to all persons of the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of the respondent.

(f) Reporting as to the manner of compliance.

(g) Requiring the posting of notices in a conspicuous place which the commission may publish or cause to be published setting forth requirements for compliance with civil rights law or other relevant information which the commission determines necessary to explain those laws.

(h) Payment to an injured party of profits obtained by the respondent through a violation of section 506.

(i) Payment to the complainant of damages for an injury or loss caused by a violation of this act, including a reasonable attorney's fee.

(j) Payment to the complainant of all or a portion of the costs of maintaining the action before the commission, including reasonable attorney fees and expert witness fees, when the commission determines that award to be appropriate.

(k) Other relief the commission deems appropriate.

(3) In the case of a respondent operating by virtue of a license issued by the state, a political subdivision, or an agency thereof, if the commission, upon notice and hearing, determines that the respondent has violated this act and that the violation was authorized, requested, commanded, performed, or knowingly permitted by the board of directors of the respondent or by an officer or executive agent acting within the scope of his employment, the commission shall so certify to the licensing agency. Unless the commission's finding is reversed in the course of judicial review, the finding of the commission may be grounds for revocation of the respondent's license.

(4) In the case of a respondent who violates this act in the course of performing under a contract or subcontract with the state, a political subdivision, or an agency thereof, where the violation was authorized, requested, commanded, performed, or knowingly permitted by the board of directors of the respondent or by an officer or executive agent acting within the scope of his employment, the commission shall so certify to the contracting agency. Unless the commission's finding is reversed in the course of judicial review, the finding is binding on the contracting agency.

Sec. 606. (1) A complainant and a respondent shall have a right of appeal from a final order of the commission, including cease and desist orders and refusals to issue charges, before the circuit court for the county of

Ingham, or the circuit court for the county in which the alleged violation occurred or where the person against whom the complaint is filed, resides, or has his or her principal place of business. An appeal before the circuit court shall be reviewed de novo. If an appeal is not taken within 30 days after the service of an appealable order of the commission, the commission may obtain a decree for the enforcement of the order from the circuit court which has jurisdiction of the appeal. If the appellant files for appeal in the circuit court for the county of Ingham, the appellee, upon application, shall be granted a change of venue to hear the matter on appeal in the circuit court for the county in which the alleged violation occurred or where the person against whom the complaint is filed, resides, or has his or her principal place of business or where the claimant resides.

(2) A proceeding for review or enforcement of an appealable order is initiated by filing a petition in the circuit court. Copies of the petition shall be served upon the parties of record. Within 30 days after the service of the petition upon the commission or filing of the petition by the commission, or within further time as the court may allow, the commission shall transmit to the court the original or a certified copy of the entire record upon which the order is based, including a transcript of the testimony, which need not be printed. By stipulation of the parties to the review proceeding, the record may be shortened. The court may grant temporary relief as it considers just, or enter an order enforcing, modifying and enforcing as modified, or setting aside in whole or in part the order of the commission, or may remand the case to the commission for further proceedings. The commission's copy of the testimony shall be available at reasonable times to all parties for examination without cost.

(3) The final judgment or decree of the circuit court shall be subject to review by appeal in the same manner and form as other appeals from that court.

(4) A proceeding under this section shall be initiated not more than 30 days after a copy of the order of the commission is received, unless the commission is the petitioner or the petition is filed under subsection (3). If a proceeding is not so initiated, the commission may obtain a court order for enforcement of its order upon showing that a copy of the petition for enforcement was served on the respondent, that the respondent is subject to the jurisdiction of the court and that the order sought to be enforced is an order of the commission, regularly entered, and the commission has jurisdictiion over the subject matter and the respondent.

ARTICLE 7

Sec. 701. Two or more persons shall not conspire to, or a person shall not:

(a) Retaliate or discriminate against a person because the person has opposed a violation of this act, or because the person has made a charge, filed a complaint, testified, assisted, or participated in an investigation, proceeding, or hearing under this act.

(b) Aid, abet, incite, compel, or coerce a person to engage in a violation of this act.

(c) Attempt directly or indirectly to commit an act prohibited by this act.

(d) Wilfully interfere with the performance of a duty or the exercise of a power by the commission or 1 of its members or authorized representatives.

(e) Wilfully obstruct or prevent a person from complying with this act or an order issued or rule promulgated under this act.

Sec. 702. A person shall not violate the terms of an order or an adjustment order made under this act.

Sec. 703. If a certification is made pursuant to section 605(3), the licensing agency may take appropriate action to revoke or suspend the license of the respondent.

Sec. 704. Upon receiving a certification made under section 605(4), a contracting agency shall take appropriate action to terminate a contract or portion thereof previously entered into with the respondent, either absolutely or on condition that the respondent carry out a program of compliance with this act, and shall advise the state and all political subdivisions and agencies thereof to refrain from entering into further contracts or extensions or other modifications of existing contracts with the respondent until the commission is satisfied that the respondent carries out policies in compliance with this act.

Sec. 705. (1) This act shall not be construed as preventing the commission from securing civil rights guaranteed by law other than the civil rights set forth in this act.

(2) This act shall not be interpreted as restricting the implementation of approved plans, programs, or services to eliminate discrimination and the effects thereof when appropriate.

(3) This act shall not be interpreted as invalidating any other act that provides programs or services for persons covered by this act.

ARTICLE 8

Sec. 801. (1) A person alleging a violation of this act may bring a civil action for appropriate injunctive relief or damages, or both.

(2) An action commenced pursuant to subsection (1) may be brought in the circuit court for the county where the alleged violation occurred, or for the county

where the person against whom the civil complaint is filed resides or has his principal place of business.

(3) As used in subsection (1), "damages" means damages for injury or loss caused by each violation of this act, including reasonable attorney's fees.

Sec. 802. A court, in rendering a judgment in an action brought pursuant to this article, may award all or a portion of the costs of litigation, including reasonable attorney fees and witness fees, to the complainant in the action if the court determines that the award is appropriate.

Sec. 803. This act shall not be construed to diminish the right of a person to direct or immediate legal or equitable remedies in the courts of this state.

Sec. 804. Act No. 251 of the Public Acts of 1955, as amended, being sections 423.301 to 423.311 of the Compiled Laws of 1970, Act No. 45 of the Public Acts of the Second Extra Session of 1963, as amended, being sections 37.1 to 37.9 of the Compiled Laws of 1970, and Act No. 112 of the Public Acts of 1968, as amended, being sections 564.101 to 564.704 of the Compiled Laws of 1970, are repealed.

/s/ T. Thos. Thatcher
Clerk of the House of Representatives

/s/ Billie S. Farnum
Secretary of the Senate

TITLE 9, UNITED STATES CODE, §§ 1-2

ARBITRATION

§ 1. "Maritime transactions" and "commerce" defined; exceptions to operation of title

"Maritime transactions", as herein defined, means charter parties, bills of lading of water carriers, agreements relating to wharfage, supplies furnished vessels or repairs to vessels, collisions, or any other matters in foreign commerce which, if the subject of controversy, would be embraced within admiralty jurisdiction; "commerce", as herein defined, means commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation, but nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in foreign or interstate commerce.

July 30, 1947, c. 392, 61 Stat. 670.

§ 2. Validity, irrevocability, and enforcement of agreements to arbitrate

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

July 30, 1947, c. 392, 61 Stat. 670.

UNITED STATES CONSTITUTION, ART 1, § 10

§ 10. Restrictions upon powers of states

Section 10. No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility.

* * *

UNITED STATES CONSTITUTION, AMENDMENT XIV, § 1

§ 1. Citizenship rights not to be abridged by states

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

(3)

Supreme Court, U.S.
FILED
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No. 96-998

In The

Supreme Court of the United States

October Term, 1996

RELIABLE BUSINESS COMPUTERS,

Petitioner,

vs.

THERESA A. HEURTEBISE,

Respondent.

On Petition for a Writ of Certiorari to the Michigan Supreme Court

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I. Whether this Court lacks jurisdiction under 28 U.S.C. § 1257, where Petitioner has failed to raise any federal question in the courts below, and the Michigan Supreme Court's decision in *Heurtebise v. Reliable Business Computers, Inc.*, 452 Mich. 405, 550 N.W. 2d 243 (1996), was based on state law, which was both independent of any federal question and adequate to support the judgment?

II. Whether Michigan law does not conflict with, and is not preempted by, the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.*, where arbitration requires a contract under both Michigan and federal law, and no contract existed in this case?

TABLE OF CONTENTS

	Page
Questions Presented	i
Table of Contents	ii
Table of Citations	iv
Opinions Below	1
Statement of Jurisdiction	1
Statement of the Case	1
Misstatements of Fact and Law in the Petition	6
Reasons for Denying the Writ	9
I. This Court Lacks Jurisdiction Over This Case Under 28 U.S.C. § 1257, Because Petitioner Failed To Raise Any Federal Question In The Courts Below, And The Michigan Supreme Court's Decision Was Based On State Law, Which Was Both Independent Of Any Federal Question And Adequate To Support The Judgment.	9
A. Peititoner *Never* Raised the Equal Protection Clause or the Contract Clause of the United States Constitution in the Lower Courts.	9
B. Petitioner Failed to Raise the Federal Arbitration Act or Federal Preemption in the Lower Courts.	10

Contents

	Page
C. The Michigan Supreme Court's Decision Was Based on State Law, Which Is Both Independent of Federal Law and Adequate to Support the Judgment.	13
1. Arbitration Requires a Contract, Which Cannot be Unilaterally Imposed on Employees.	14
2. The Michigan Supreme Court Properly Held that Petitioner's Employee Handbook Was NOT a Contract.	15
3. Petitioner Improperly Asks this Court to Review Questions of State Law, and Incorrectly Interprets State Law.	17
II. Even If The Federal Arbitration Act Applied To This Case, There Is No Conflict Preemption, And This Court Should Not Review The Michigan Supreme Court's Decision.	21
A. The Federal Arbitration Act Requires a Contract.	21
B. The Goals and Policies of the FAA Are Furthered, Rather than Undermined, by the Michigan Supreme Court's Decision.	22
Conclusion	24

Contents

Page

TABLE OF CITATIONS

Cases Cited:

Allied-Bruce Terminix Companies, Inc. v. Dobson, __ U.S. __, 115 S. Ct. 834, 130 L. Ed. 2d 753 (1995) 22

Board of Directors of Rotary Int'l v. Rotary Club, 481 U.S. 537, 107 S. Ct. 1940, 95 L. Ed. 2d 474 (1987) 12, 13

California v. Freeman, 488 U.S. 1311, 109 S. Ct. 854, 102 L. Ed. 2d 957 (1989) 17

Carlson v. Hutzel Corp. of Michigan, 183 Mich. App. 508, 455 N.W. 2d 335 (1990) 19

Clark v. Jeter, 486 U.S. 456, 108 S. Ct. 1910, 100 L. Ed. 2d 465 (1988) 13

Coleman v. Thompson, 501 U.S. 722, 111 S. Ct. 2546, 115 L. Ed. 2d 640 (1991), *reh. denied*, 501 U.S. 1277, 112 S. Ct. 27 (1991) 14

Dumas v. Auto Club Ins. Ass'n., 437 Mich. 521, 473 N.W. 2d 652 (1991) 19, 20

Ehresman v. Bultnyck & Co., 203 Mich. App. 350, 511 N.W. 2d 724 (1994) 14

Contents

	Page
First Options of Chicago, Inc. v. Kaplan, __ U.S. __, 115 S. Ct. 1920, 131 L. Ed. 2d 485 (1995)	23
Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 111 S. Ct. 1647, 114 L. Ed. 2d 26 (1991)	10, 11
Hess v. West Bloomfield Twp., 439 Mich. 550, 486 N.W. 2d 628 (1992)	13
Heurtebise v. Reliable Business Computers, Inc., 207 Mich. App. 308, 523 N.W. 2d 904 (1994)	1, 4
Heurtebise v. Reliable Business Computers, Inc., 452 Mich. 405, 550 N.W. 2d 243 (1996) .....i, 1, 6, 8, 14, 16	
Horn v. Cooke, 118 Mich. App. 740, 325 N.W. 2d 558 (1982)	15
In re: Certified Question, Bankey v. Storer Broadcasting Company, 432 Mich. 438, 443 N.W. 2d 112 (1989)	19, 20
Lear, Inc. v. Adkins, 395 U.S. 653, 89 S. Ct. 1902, 23 L. Ed. 2d 610 (1969)	5
Monks v. New Jersey, 398 U.S. 71, 90 S. Ct. 1563, 26 L. Ed. 2d 54 (1970)	9
Overall Supply Co. v. Peloquin Enterprises, 414 Mich. 95, 323 N.W. 2d 1 (1982)	14

Contents

Page

Renny v. Port Huron Hospital, 427 Mich. 415, 398 N.W. 2d 327 (1986) 18

Rood v. General Dynamics Corp., 444 Mich. 107, 507 N.W. 2d 591 (1993) 15, 16, 19

Rowe v. Montgomery Ward, 437 Mich. 627, 473 N.W. 2d 268 (1991) 20

Scholz v. Montgomery Ward & Co., 437 Mich. 83, 468 N.W. 2d 845 (1991) 20, 21

Shearson/American Express, Inc. v. McMahon, 482 U.S. 220, 107 S. Ct. 2332, 96 L. Ed. 2d 185 (1987) ... 22

Toussaint v. Blue Cross & Blue Shield of Michigan, 408 Mich. 579, 292 N.W. 2d 880 (1980) ... 17, 18, 19, 20, 21

Webb v. Webb, 451 U.S. 493, 101 S. Ct. 1889, 68 L. Ed. 2d 392 (1981) 9, 10, 12, 13

Volt Information Sciences v. Board of Trustees of Stanford University, 489 U.S. 468, 109 S. Ct. 1248, 103 L. Ed. 2d 488 (1989) 22, 23

Yee v. City of Escondido, 503 U.S. 519, 112 S. Ct. 1522, 118 L. Ed. 2d 153 (1992) 9

Statutes Cited:

9 U.S.C. § 1, *et seq.* ..... i, 8, 11

Contents

	Page
9 U.S.C. § 2	21
28 U.S.C. § 1257	i, 1, 8, 9, 14
29 U.S.C. § 621	11
M.S.A. § 27A.5001(2), *et seq.*	8, 15
M.S.A. § 3.548(101), *et seq.*	3
M.C.L. § 37.2101, *et seq.*	3
M.C.L. § 600.5001, *et seq.*	10
M.C.L. § 600.5001(2)	8, 15
United States Constitution Cited:	
Am. XIV, § 1	9
Art. I, § 10	9
Rules Cited:	
Michigan Court Rule 2.113(F)	3
Michigan Court Rule 7.316(A)(4)	5, 7
Supreme Court Rule 15.2	6

Contents

Page

APPENDIX

Appendix A — Excerpts from Employee Handbook .. 1a

Appendix B — Affidavit of Christopher R. Holliday . 3a

OPINIONS BELOW

The Michigan Supreme Court's decision is reported at 452 Mich. 405, 550 N.W. 2d 243 (1996).

The Michigan Court of Appeals' decision, which the Michigan Supreme Court reversed, is reported at 207 Mich. App. 308, 523 N.W. 2d 904 (1994).

The trial court's opinion and order denying Defendant-Petitioner's motion to compel arbitration is contained in Plaintiff-Appellant's Appendix in the Michigan Supreme Court, pp. 51a-70a.

STATEMENT OF JURISDICTION

This Court lacks jurisdiction to review this case under 28 U.S.C. § 1257. Respondent failed to raise any federal question in the courts below, and the Michigan Supreme Court's decision is grounded in Michigan law, which is both independent of federal law and adequate to support the judgment.

STATEMENT OF THE CASE

Respondent Theresa Heurtebise ("Respondent"), began working for Petitioner Reliable Business Computers, Inc. ("Petitioner"), in May 1989. When she began her employment, Ms. Heurtebise received an employee handbook that expressly stated, "None of the policies, practices, procedures, or other matters set forth herein create any employment or personal contract, express or implied." Respondent's Appendix, (hereafter "Resp. App."), at 2a.

The non-contractual employment handbook included a provision requiring binding arbitration of "any dispute, matter

or controversy involving claims of monetary damages and/or employment related matters . . . including any and all claims relating to termination of employment." Pet. App. at A-65 - A-66.

At the time she received the handbook, Ms. Heurtebise was required to sign an "Employee Acknowledgment" form, acknowledging receipt of the employee handbook. The acknowledgment form stated that the employee agreed "to conform to the various procedures, rules and regulations of the company as set forth in the handbook." Pet. App. at A-62.

Petitioner asserts that Respondent's signature on this acknowledgment form constituted an agreement to arbitrate Respondent's civil rights claim. However, arbitration requires a contract, and the very first page of the Employee Handbook makes clear that nothing contained in the handbook is a contract.

Petitioner's Employee Handbook states on page 2:

> **It is important to recognize and clarify that the Policies specified herein do not create any employment or personal contract, express or implied . . .**
>
> **From time to time, the COMPANY specifically reserves the right, and may make modifications to any or all of the Policies herein, at its sole discretion, and as future conditions warrant.**

Resp. App. at 1a.

Theresa Heurtebise was discharged from her employment on or about July 20, 1990, after she and a male co-worker

allegedly returned late from lunch. However, Ms. Heurtebise's male co-worker was not discharged. On November 25, 1991, Ms. Heurtebise commenced a sex discrimination lawsuit under Michigan's Elliott-Larsen Civil Rights Act, M.C.L. § 37.2101 *et seq.*, M.S.A. § 3.548(101) *et seq.*, against Petitioner in Wayne County Circuit Court. Appendix, pp. 1a-6a.[1]

In response to the Complaint, Petitioner filed a motion seeking to enforce the handbook arbitration clause under Michigan law. Appendix, pp. 7a-23a.

Pursuant to Michigan Court Rule (MCR) 2.113(F), Petitioner was required to attach "a copy of the instrument [upon which it relies] or its pertinent parts" to its motion. Petitioner did not attach the complete handbook or all of the "pertinent parts" to its motion. Rather, Petitioner submitted only the "Employee Acknowledgment" form and pages 64 through 71 of the Employee Handbook. Appendix, pp. 24a-32a. Page 64 of the submitted portion of the handbook states that none of the policies, practices, or procedures contained therein create a contract. Appendix, p. 25a.

Ms. Heurtebise had misplaced her copy of the employee handbook, and her counsel did not have it to provide to the court. *See* Affidavit of Christopher R. Holliday, Resp. App. at 3a-9a. Petitioner never produced the complete handbook, despite Respondent's proper requests for it.[2]

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1. In this Brief, Respondent will cite to Plaintiff-Appellant's Appendix ("Appendix"), which was filed in the Michigan Supreme Court. Plaintiff-Appellant's Supplemental Appendix filed with that court contains the complete employee handbook.

2. *See* Plaintiff's motion to amend the record in the Michigan Supreme Court, and the Exhibits attached thereto.

At the hearing on Petitioner's motion, Judge Cynthia D. Stephens properly ruled that Petitioner had not met its burden of proving that it was entitled to arbitration, finding: (1) the requirement that employees arbitrate "any and all claims relating to termination of employment" violates public policy; (2) the employee handbook is ambiguous; and (3) the parties did not have a meeting of the minds concerning the alleged agreement to arbitrate claims under the Elliott-Larsen Civil Rights Act. Appendix, pp. 64a-65a.

Judge Stephens accordingly denied Petitioner's motion on April 16, 1992. Appendix, pp. 69a-70a.

Without seeing the complete employee handbook, the Michigan Court of Appeals granted leave to appeal, and reversed the trial court's denial of Petitioner's motion to compel arbitration. *Heurtebise v. Reliable Business Computers, Inc.*, 207 Mich. App. 308, 523 N.W. 2d 904 (1994).

The Michigan Court of Appeals opined: (1) the arbitration provision in the employee handbook is unambiguous; (2) the record does not support the trial court's finding that there was no meeting of the minds concerning the arbitration provision; (3) even if the parties' minds did not meet, "mutual assent to a term of employment is not required;" (4) the "no contract" provision of the employee handbook does not address the handbook in its entirety, but only the at-will employment provisions in the handbook; and (5) public policy does not prohibit enforcement of a "valid arbitration agreement" requiring arbitration of civil rights claims. 207 Mich. App. at 310-311.

The Court of Appeals denied Respondent's motion for rehearing. Respondent then sought leave to appeal to the Michigan Supreme Court on January 24, 1995, which was granted on December 28, 1995.

After briefs were filed in the Michigan Supreme Court, Respondent's counsel received a copy of the entire Employee Handbook from a former employee of Petitioner. **The very first page of the Employee Handbook, which Petitioner never submitted to the lower courts, makes clear that *nothing* contained in the handbook is a contract:**

> It is important to recognize and clarify that the Policies specified herein do not create any employment or personal contract, express or implied . . .
>
> From time to time, the COMPANY specifically reserves the right, and may make modifications to any or all of the Policies herein, at its sole discretion, and as future conditions warrant.

Resp. App. at 1a. Accordingly, neither the arbitration provision nor any other provision in Petitioner's handbook is a contract.

The Michigan Supreme Court granted Respondent's motion to amend the record pursuant to MCR 7.316(A)(4). Respondent submitted a supplemental appendix containing Petitioner's complete employee handbook.[3] *See* Plaintiff-Appellant's Supplemental Appendix.

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3. Petitioner complains that the Michigan Supreme Court should not have considered the first page of the employee handbook, because it was not available until the case was in the Michigan Supreme Court. However, the court properly granted Respondent's motion to enlarge the record, to include the complete handbook when Respondent's counsel procured a copy. MCR 7.316(A)(4). Since the Michigan Supreme Court treated the first page of the handbook as an important part of the record, this Court is free to consider it. *Lear, Inc. v. Adkins*, 395 U.S. 653, 657 n. 1, 89 S. Ct. 1902, 1904 n.1, 23 L. Ed. 2d 610 (1969).

On July 16, 1996, the Michigan Supreme Court reversed the decision of the Court of Appeals, because the language on the first page of Petitioner's handbook denied the existence of a contract. 452 Mich. 405 (1996). The Michigan Supreme Court unanimously held:

- (1) It is undisputed that an arbitration agreement is unenforceable if it is not a binding contract;

- (2) Petitioner's language on the first page of the handbook demonstrates that Petitioner did not intend to be bound to any provision contained in the handbook;

- (3) Therefore, the handbook did not create an enforceable arbitration agreement.

452 Mich. at 413-414.

On September 16, 1996, the Michigan Supreme Court denied Petitioner's motion for rehearing. On December 13, 1996, Petitioner filed its Petition for Writ of Certiorari to the Michigan Supreme Court, which contains many misstatements of fact and law, and raises federal issues for the first time in this case.

MISSTATEMENTS OF FACT AND LAW IN THE PETITION

Pursuant to Rule 15.2 of this Court, Respondent must illuminate several misstatements of both fact and law in the Petition for Writ of Certiorari.

Petitioner erroneously states, "Plaintiff's counsel had a complete copy of the entire handbook at all times and could have supplied it before the trial, but did not." Petition, p. 3. As

noted in the affidavit of Christopher R. Holliday (Resp. App. at 6a), and Plaintiff-Appellant's motion to amend the record, Ms. Heurtebise had misplaced her copy of the employee handbook. After initial briefs were filed in the Michigan Supreme Court, Respondent's counsel received a copy of the complete employee handbook from another former employee of Petitioner. Resp. App. at 6a.

Petitioner argues that, in granting Respondent's motion to amend the record, the Michigan Supreme Court violated its own court rules on motion practice. Petition at 2. To the contrary, MCR 7.316(A)(4) permits the court to amend the record by adding matters which should have been included.

Petitioner erroneously states that the Michigan Supreme Court refused to enforce the arbitration policy simply because Ms. Heurtebise "asserted an employment discrimination claim under a state statute." Petition at 9, 28. In fact, the Michigan Supreme Court refused to compel Ms. Heurtebise to arbitrate her claim because the court correctly found that no arbitration contract exists in this case.

Petitioner alleges that the Michigan Supreme Court singles out arbitration as a suspect class of contracts, holding arbitration up to a higher standard of contract formation, in violation of Michigan's arbitration statute. Petition at 8, 10, 22. In reality, the Michigan Supreme Court merely followed the well-settled law that arbitration, including statutory arbitration, requires a contract. Based on Petitioner's own statements in its handbook, it is clear that none of the handbook provisions were contractual.

Petitioner further asserts that Respondent's remedies in this case are based on Petitioner's handbook, and the Michigan Supreme Court held other provisions of the employee handbook enforceable, while refusing to enforce the arbitration provision.

Petition at 14, 29. To the contrary, Respondent's rights in this case are based on Michigan law governing employment discrimination claims. The Michigan Supreme Court did not enforce *any* provision of the handbook, as it found that "the defendant did not intend to be bound to *any* provision contained in the handbook." 452 Mich. at 414 (emphasis added).

Petitioner asserts that the decision below conflicts with state law, and must therefore be vacated. Petition at 21-23. As noted *infra*, the Michigan Supreme Court's decision was consistent with both Michigan and federal law. Furthermore, even if the decision conflicted with Michigan law, this Court could not vacate it as "conflict preempted."

Petitioner boldly asserts: "Even an agreement to arbitrate discrimination claims allegedly *unilaterally imposed by the employer as a condition of employment* is enforceable under the statute." Petition at 17 (emphasis in original). As discussed *infra*, arbitration under both the Michigan Arbitration Act (MAA), M.C.L. § 600.5001(2), M.S.A. § 27A.5001(2), *et seq.*, and the Federal Arbitration Act (FAA), 9 U.S.C. § 1, *et seq.*, require mutuality of assent, and arbitration cannot be unilaterally imposed by one party on another party.

Finally, Petitioner repeatedly, falsely asserts that it properly raised the issues of federal preemption and the Federal Arbitration Act's application to this case in the state courts. *See, e.g.*, Petition at 4, 6, 9-10. In fact, Petitioner never discussed any federal issue until it filed its brief in the Michigan Supreme Court. *See* § I(B), *infra.*

Because this Court lacks jurisdiction over this case under 28 U.S.C. § 1257, and the Michigan Supreme Court's decision does not conflict with any federal law, the Petition for Writ of Certiorari should be denied.

REASONS FOR DENYING THE WRIT

I.

THIS COURT LACKS JURISDICTION OVER THIS CASE UNDER 28 U.S.C. § 1257, BECAUSE PETITIONER FAILED TO RAISE ANY FEDERAL QUESTION IN THE COURTS BELOW, AND THE MICHIGAN SUPREME COURT'S DECISION WAS BASED ON STATE LAW, WHICH WAS BOTH INDEPENDENT OF ANY FEDERAL QUESTION AND ADEQUATE TO SUPPORT THE JUDGMENT.

A. Petitioner *Never* Raised the Equal Protection Clause or the Contract Clause of the United States Constitution in the Lower Courts.

This Court will not decide federal constitutional issues which are raised for the first time in this Court. *Yee v. City of Escondido*, 503 U.S. 519, 533, 112 S. Ct. 1522, 1531, 118 L. Ed. 2d 153 (1992); *Webb v. Webb*, 451 U.S. 493, 499, 101 S. Ct. 1889, 1893, 68 L. Ed. 2d 392 (1981); *Monks v. New Jersey*, 398 U.S. 71, 90 S. Ct. 1563, 26 L. Ed. 2d 54 (1970).

In its Petition for Writ of Certiorari, Petitioner raises federal Equal Protection and Contract Clause claims for the very first time. United States Constitution, Am. XIV, §1, United States Constitution, Art. I, § 10. Petitioner's Equal Protection and Contract Clause claims were never even mentioned in the courts below, and they are not properly before this Court.

Even if Petitioner's Equal Protection and Contract Clause claims were properly before this Court, those claims would have no merit. The Michigan Supreme Court in this case merely decided that (1) arbitration requires a contract, and (2) there

was no arbitration contract in this case. This decision makes no classification in violation of the Equal Protection Clause, and it does not impair the enforcement of any contracts.

B. Petitioner Failed to Raise the Federal Arbitration Act or Federal Preemption in the Lower Courts.

"At the minimum, . . . there should be no doubt from the record that a claim under a *federal* statute or the *Federal* constitution was presented in the state courts and that those courts were apprised of the nature or substance of the federal claim at the time and in the manner required by the **state** law." *Webb*, 451 U.S. at 501, 101 S. Ct. at 1894 (emphasis added and emphasis in original).

Contrary to Petitioner's assertions in its petition, it did not raise the issues of (1) federal preemption, or (2) the applicability of the Federal Arbitration Act to this case, in the lower courts.

Throughout its motion and brief in the trial court, Petitioner sought to enforce its arbitration provision under "the Michigan Uniform Arbitration Act, M.C.L. § 600.5001 *et seq.* and Michigan Common Law." Appendix, pp. 8a. Petitioner never even mentioned the FAA. Appendix at 7a-36a.

In the appellate courts, Petitioner continued its reliance on Michigan law. However, Petitioner began to discuss *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 111 S. Ct. 1647, 114 L. Ed. 2d 26 (1991), as a federal case on an "analogous" question to the case at bar.

Petitioner mentioned the FAA only as it discussed the facts of *Gilmer* in its briefs in the Michigan Court of Appeals and the Michigan Supreme Court. In *Gilmer*, the plaintiff registered as a securities broker with the New York Stock Exchange (NYSE).

His securities registration application and NYSE rules required arbitration of any claims between a registered representative and a member organization arising out of the termination of employment. 111 S. Ct. at 1650-1651. Mr. Gilmer was discharged from his employment, at the age of 62, and subsequently filed a claim under the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 621. This Court found, pursuant to the FAA, that the arbitration agreement in the registration application compelled Mr. Gilmer to arbitrate his age discrimination claim.

However, this Court expressly limited its holding to the facts in *Gilmer*. This Court noted that § 1 of the FAA provides that "nothing herein contained shall apply to contracts of employment of seamen, railroad employees, or any other class of workers engaged in interstate commerce." 111 S. Ct. at 1651-1652 n.2. This Court explicitly observed that the arbitration agreement in *Gilmer* was ***not*** contained in a contract of employment. The agreement was contained in a securities registration application, which was a contract with the securities exchanges, ***not*** with Mr. Gilmer's employer.[4]

While *Gilmer* was decided under the FAA, Petitioner in this case did ***not*** argue that the FAA applied here. Rather, Petitioner relied on Michigan law, and the Michigan Arbitration Act. Indeed, in its brief in the Michigan Court of Appeals, Petitioner argued that the FAA's exclusion for employment contracts "is not an issue in the case at bar since the Michigan UAA [Uniform Arbitration Act] does not have an exception for employment contracts as in the FAA." Defendant's Brief on Appeal, Michigan Court of Appeals, p. 28, n.6.

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4. While no arbitration agreement exists in this case, if there were such an agreement, it would be contained in a contract of employment, to which *Gilmer* and the FAA would not apply.

Petitioner did not even *mention* federal preemption, or assert that the FAA applied to this case, until it filed its Brief on Appeal in the Michigan Supreme Court. In that brief, Petitioner stated in a footnote:

> Construing the MAA [Michigan Arbitration Act] as limiting arbitration to certain types of claims would also run afoul of the doctrine of federal preemption under the Federal Arbitration Act, 9 U.S.C. §§ 1-5, ("FAA"). The FAA states an overriding federal mandate for broad construction of arbitration agreements that prohibits states [sic] statutes or court decisions that might limit arbitration agreements.

Defendant-Appellant's Brief on Appeal, Michigan Supreme Court, p. 12, n.6.

Petitioner only squarely raised the FAA and federal preemption in its motion for rehearing in the Michigan Supreme Court. That motion was denied without comment.

When "the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this Court can affirmatively show the contrary." *Webb v. Webb*, 451 U.S. 493, 495, 101 S. Ct. 1889, 1891, 68 L. Ed. 2d 392 (1981). Petitioner cannot make such a showing here.

In *Board of Directors of Rotary Int'l. v. Rotary Club*, 481 U.S. 537, 107 S. Ct. 1940, 95 L. Ed. 2d 474 (1987), the appellants, like Petitioner in the case at bar, did not present federal constitutional issues squarely to the state courts until

their petition for rehearing with the Court of Appeals, which denied the appellant's petition without opinion. This Court held that the appellants failed to show that they adequately presented the federal issues to the state courts. 481 U.S. at 550, 107 S. Ct. at 1948.

In the present case, Petitioner did not squarely present the issue of federal preemption until it filed its motion for rehearing with the Michigan Supreme Court. The Michigan Supreme Court denied Petitioner's motion without opinion, and Petitioner cannot show that it properly presented the issue below.

Under Michigan law, by the time Petitioner raised federal issues for the first time in its motion for rehearing, those issues had not been preserved for appeal, and were therefore not properly before the Michigan Supreme Court. *Hess v. West Bloomfield Twp.*, 439 Mich. 550, 557 n.6, 486 N.W. 2d 628 (1992) (preemption issue which was not raised in the trial court was not preserved for review by the Michigan Supreme Court). This Court therefore should deny certiorari. *Webb* and *Rotary*, *supra. See also Clark v. Jeter*, 486 U.S. 456, 459-460, 108 S. Ct. 1910, 1913-1914, 100 L. Ed. 2d 465 (1988) (this Court will not review issue of federal preemption of state law when petitioner did not expressly assert that state law was preempted in state court).

Given Petitioner's failure to present any federal question in the lower courts, this Court should deny the Petition for Writ of Certiorari.

C. The Michigan Supreme Court's Decision Was Based on State Law, which Is Both Independent of Federal Law and Adequate to Support the Judgment.

Even if Petitioner had properly presented a federal question

in the lower courts, this Court would have no jurisdiction over this case. This Court has no jurisdiction to review a state court judgment which is based on state law that is "independent of the federal question and adequate to support the judgment." *Coleman v. Thompson*, 501 U.S. 722, 729, 111 S. Ct. 2546, 2553-2554, 115 L. Ed. 2d 640 (1991), *reh. denied*, 501 U.S. 1277, 112 S. Ct. 27 (1991).

When this Court reviews a state court decision pursuant to 28 U.S.C. § 1257, it is reviewing a judgment. If resolution of the federal question cannot affect the judgment, "there is nothing for the Court to do." 501 U.S. 730, 111 S. Ct. 2554.

In the case at bar, this Court's resolution of any federal question cannot affect the judgment of the Michigan Supreme Court for two reasons. First, the Michigan Supreme Court properly found that, under Michigan law, arbitration requires a contract, and Petitioner's employment handbook expressly stated that nothing in it was a contract. Second, as discussed in Point II, *infra*, even under the FAA, arbitration requires a contract, and Petitioner's handbook does not meet that requirement.

1. Arbitration Requires a Contract, Which Cannot Be Unilaterally Imposed on Employees.

It is well settled in Michigan that arbitration requires a contract. *Arrow Overall Supply Co. v. Peloquin Enterprises*, 414 Mich. 95, 98, 323 N.W. 2d 1 (1982); *Ehresman v. Bultnyck & Co.*, 203 Mich. App. 350, 353-354, 511 N.W. 2d 724 (1994). The Michigan Supreme Court therefore properly held that "an arbitration provision is unenforceable if it is not a binding contract." *Heurtebise*, 452 Mich. at 413.

Before ordering a party to arbitration, courts must first determine whether a valid arbitration contract exists. " 'The

determination of whether an arbitration contract exists is for the courts to decide, applying general contract principles.' " *Horn v. Cooke*, 118 Mich. App. 740, 744-745, 325 N.W. 2d 558 (1982) (citations omitted).

Petitioner's assertion that an arbitration agreement under the Michigan Arbitration Act need only be an "instrument in writing" provides it no help. Petition, p. 22. The "instrument in writing," in order to be an enforceable arbitration agreement under the Michigan Arbitration Act, must be a contract. M.C.L. § 600.5001(2), M.S.A. § 27A.5001(2).

Petitioner also incorrectly asserts that it may unilaterally impose arbitration on its employees. "Contractual liability is consensual. A basic requirement of contract formation is that the parties mutually agree to be bound." *Rood v. General Dynamics Corp.*, 444 Mich. 107, 118, 507 N.W. 2d 591 (1993). "No contract to arbitrate can arise except upon the expressed mutual assent of the parties." *Horn*, 118 Mich. App. at 744-745.

The Michigan Supreme Court correctly held that arbitration requires a contract.

2. The Michigan Supreme Court Properly Held that Petitioner's Employee Handbook Was NOT a Contract.

In the case at bar, the opening statement of Petitioner's employee handbook states:

> It is important to recognize and clarify that the Policies specified herein do not create any employment or personal contract, express or implied. . . .
>
> From time to time, the COMPANY

> specifically reserves the right, and may make modifications to any or all of the Policies herein, at its sole discretion, and as future conditions may warrant.

Resp. App. at 1a. In addition, the handbook contains similar language denying the existence of a contract on page 64:

> None of the policies, practices, procedures, or other matters set forth herein create any employment or personal contract, express or implied.

Resp. App. at 2a.

The Michigan Supreme Court properly held, regardless of the employee acknowledgment form signed by Ms. Heurtebise, that the language on the first page of the employee handbook meant what it said — "the defendant did not intend to be bound by any provision contained in the handbook." 452 Mich. at 414.

Petitioner now asserts that its language denying the existence of any contract, express or implied, was merely an "at-will disclaimer" denying only the existence of a contract to discharge for cause.

However, courts "follow the objective theory of assent, focusing on how a reasonable person in the position of the promisee would have interpreted the promisor's statements or conduct." *Rood* at 119. In the case at bar, Petitioner's handbook stated that its policies did not create any contract, and ***none*** of its policies, practices, procedures or other matters created any contract. Resp. App. at 1a-2a.

Petitioner essentially seeks to bind its employees to an

arbitration provision in its employee handbook, while itself remaining free of any contractual obligation under any provision in the handbook. However, Petitioner's requested interpretation of its handbook lacks mutuality:

> A contract lacks mutuality when one party is obligated to perform, but not the other. . . . Where a contract obligates only one party to perform, while exempting the other party from any obligation to do so, it lacks mutuality and is void for want of consideration. *Commercial Movie Rental v. Larry Eagle, Inc.*, 738 F.Supp. 227, 229-230 (W.D. Mich 1989).

The Michigan Supreme Court correctly concluded that nothing in Petitioner's handbook was a contract.

3. Petitioner Improperly Asks this Court to Review Questions of State Law, and Incorrectly Interprets State Law.

Petitioner asks this Court to grant a writ of certiorari, because the Michigan Supreme Court's decision allegedly contradicts Michigan statutory and common law. However, "[i]nterpretations of state law by a State's highest court are, of course, binding upon this Court." *California v. Freeman*, 488 U.S. 1311, 1313, 109 S. Ct. 854, 856, 102 L. Ed. 2d 957 (1989). In addition, the Michigan Supreme Court's decision is consistent with Michigan law.

Petitioner incorrectly asserts that, under *Toussaint v. Blue Cross & Blue Shield of Michigan*, 408 Mich. 579, 292 N.W. 2d 880 (1980), Petitioner may unilaterally impose arbitration on its employees by including an arbitration policy in its non-contractual employment handbook.

In *Toussaint*, the Michigan Supreme Court held generally that (1) an employer may enter into a **contract** with its employees to terminate the employment only for cause; and (2) an employer's 'just cause termination' statements in employment handbooks may create **"legitimate expectations"** in its employees that they will only be discharged for cause, making the policy statements enforceable against the employer. 408 Mich. at 610, 613-614. The parties need not mutually agree for these handbook provisions to bind the employer. 408 Mich. at 614-615.

If an employer imposes upon itself a policy to discharge for cause only, the court in *Toussaint* observed that the employer could avoid jury review of a wrongful discharge case under that agreement by providing for binding arbitration. 408 Mich. at 624. *See also, Renny v. Port Huron Hospital*, 427 Mich. 415, 439-430, 432, 398 N.W. 2d 327 (1986). When an employer bestows the benefit of a just-cause employment relationship upon its employees, the employer has the right to determine the forum in which employees' claims under the just-cause policy may be heard. 408 Mich. at 624.

Petitioner argues that mutual assent to an arbitration contract in this case was not required, relying on the "legitimate expectations" leg of *Toussaint* and its progeny. However, the very first page of Petitioner's Employee Handbook negates any application of the *Toussaint* legitimate expectations analysis in this case. Petitioner's handbook states: **"From time to time, the COMPANY specifically reserves the right, and may make modifications to any or all of the Policies herein, at its sole discretion, and as future conditions warrant."** Resp. App. at 1a.

Under *Toussaint*, an employer's statement that its personnel policies are subject to unilateral change by the employer prevents

employees from relying on the legitimate expectations analysis. "Employers can make known to their employees that personnel policies are subject to unilateral changes by the employer. Employees would then have no legitimate expectation that any particular policy will continue to remain in force." *Toussaint*, 408 Mich. at 619; *In re: Certified Question, Bankey v. Storer Broadcasting Company*, 432 Mich. 438, 453, 443 N.W. 2d 112 (1989).

Moreover, *Toussaint* "legitimate expectations" analysis does not apply to arbitration agreements. Arbitration is a matter of contract, and the legitimate expectations analysis operates *outside* contract law.

Indeed, the Michigan Supreme Court has repeatedly emphasized that the "legitimate expectations" leg of *Toussaint* does not involve traditional contract law. *Dumas v. Auto Club Ins. Ass'n.*, 437 Mich. 521, 529 n.4, 531, 473 N.W. 2d 652 (1991); *Rood, supra*, 444 Mich. at 13 ("the legitimate expectations theory of *Toussaint* is not based on traditional contract analysis"); *In Re: Certified Question*, 432 Mich. at 453 (the enforceability of written personnel policies under the legitimate expectations leg of *Toussaint* is not based on traditional contract law); *Carlson v. Hutzel Corp. of Michigan*, 183 Mich. App. 508, 513, 455 N.W. 2d 335 (1990).

Furthermore, the legitimate expectations analysis only applies to claims for wrongful discharge based on employment handbooks. In *Dumas*, Justice Riley observed that *Toussaint* should not be extended " 'beyond wrongful discharge into every facet of the employment relationship. . . . [I]t would be prudent and wise to leave to the Legislature the public policy decision whether, or to what extent, *Toussaint* should be extended beyond wrongful discharge.' " 437 Mich. at 532 (citation omitted). In

Dumas, the Michigan Supreme Court refused to apply legitimate expectations analysis to an alleged promise to freeze renewal commissions. Such a promise must be tested under traditional contract principles, which require an objective manifestation of mutual assent. 437 Mich. at 542.

In the case at bar, Respondent's claim is a civil rights claim, which is independent of Petitioner's employment handbook. An arbitration policy is, of course, not a wrongful discharge claim, and *Toussaint* does not make Petitioner's policy enforceable.

In addition, handbook "policies" like Petitioner's arbitration policy, are not contracts, especially where the employer explicitly denies the existence of a contract. In *Rowe v. Montgomery Ward*, 437 Mich. 627, 645-646, 473 N.W. 2d 268 (1991), the Michigan Supreme Court distinguished "policy" language from contractual language: "Harryman's words were couched in general terms, more akin to stating a policy as opposed to offering an express contract." **"A 'policy' is commonly understood to denote a flexible framework for operational guidance, and not a perpetually binding contractual obligation."** *In Re: Certified Question*, 432 Mich. at 456.

In support of its position, Petitioner cites *Scholz v. Montgomery Ward & Co.*, 437 Mich. 83, 468 N.W. 2d 845 (1991), a wrongful discharge breach of contract case. The court in *Scholz* stated that the "sole issue" in that case was whether the plaintiff had a contract not to be discharged for refusing to work Sundays. 437 Mich. at 85-86.

In *Scholz*, the plaintiff argued that her employer agreed not to make her work Sundays. The employer issued a new handbook setting forth an at-will policy, and had the plaintiff execute a sign-off sheet. The Michigan Supreme Court held that, even

assuming the plaintiff had an earlier contract not to be discharged for refusing to work Sundays, the sign-off sheet qualified as an enforceable written modification of that contract. *Id.* at 86, 90 n.7, 93. **In this case, the handbook itself provides that no arbitration or other contract exists.** Plaintiff's signature on an Employee Acknowledgment form did not create any contract.

Petitioner's clear purpose in employing language denying the existence of any contract and reserving the right to unilaterally modify the handbook provisions was to avoid application of *Toussaint* and its progeny to ***any*** of the handbook provisions. Petitioner cannot be permitted to avoid application of *Toussaint* liability, and at the same time apply *Toussaint* to restrict its employees' civil rights, which are independent of any of Petitioner's employment policies.

The Michigan Supreme Court correctly decided on independent and adequate state law grounds that no arbitration contract existed in this case. The Petition for Writ of Certiorari should be denied.

II.

EVEN IF THE FEDERAL ARBITRATION ACT APPLIED TO THIS CASE, THERE IS NO CONFLICT PREEMPTION, AND THIS COURT SHOULD NOT REVIEW THE MICHIGAN SUPREME COURT'S DECISION.

A. The Federal Arbitration Act Requires a Contract.

Even if the Federal Arbitration Act applied to this case, the Michigan Supreme Court's decision was consistent with the Act. The Federal Arbitration Act requires that an arbitration provision be in a ***contract*** to be enforceable. 9 U.S.C. § 2.

Furthermore, this Court has made clear that the federal policy in favor of arbitration does not mandate arbitration where no arbitration contract exists. In *Volt Information Sciences v. Board of Trustees of Stanford University*, 489 U.S. 468, 109 S. Ct. 1248, 103 L. Ed. 2d 488 (1989), this Court noted that the thrust of the Federal Arbitration Act is that "arbitration is strictly a matter of contract." 489 U.S. at 472, 109 S. Ct. at 1252.

In *Volt*, this Court held that a California law permitting a court to stay arbitration proceedings pending the resolution of related litigation was ***not*** preempted by the FAA. The FAA contains no express preemption provision. 489 U.S. at 477, 109 S. Ct. at 1255.

Rather, state law will be preempted by the FAA if it actually conflicts with the FAA " — that is, to the extent that it stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Volt*, 489 U.S. at 477, 109 S. Ct. at 1255. The Michigan Supreme Court's decision in this case furthers, rather than conflicts with, the goals of the FAA. Conflict preemption is inapplicable to this case.

B. The Goals and Policies of the FAA Are Furthered, Rather than Undermined, by the Michigan Supreme Court's Decision.

"The FAA was designed to overrule the judiciary's long-standing refusal to enforce agreements to arbitrate, and to place such agreements upon the same footing as other ***contracts***." *Volt*, 489 U.S. at 478, 109 S. Ct. at 1255 (emphasis added, citations omitted). *See also, Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 225-226, 107 S. Ct. 2332, 2337, 96 L. Ed. 2d 185 (1987); *Allied-Bruce Terminix Companies, Inc. v. Dobson*, __ U.S. __, 115 S. Ct. 834, 838, 130 L. Ed. 2d 753 (1995) (the basic purpose of the FAA is to "overcome courts' refusal to enforce agreements to arbitrate").

However, the FAA was not intended to allow one party to force arbitration on another party in the absence of a contract. As noted by the Court in *Volt*:

> **[W]e have recognized that the FAA does not require parties to arbitrate when they have not agreed to do so. . . . *the Act was designed to make arbitration agreements as enforceable as other contracts, but not more so.***

Volt, 489 U.S. at 478, 109 S. Ct. at 1255 (emphasis added).

Petitioner incorrectly asserts that arbitration "agreements" which are unilaterally imposed on employees by their employers are enforceable under the FAA. Petition at 17. As stated above, arbitration requires a contract, which requires ***mutual*** assent to be binding. Furthermore, this Court has made clear that **"Arbitration under the Act is a matter of consent, not coercion."** *Volt*, 489 U.S. at 479, 109 S. Ct. at 1256.

The Michigan Supreme Court correctly found, based upon Petitioner's own words in its handbook, that no arbitration contract existed in this case under Michigan law. Even under the FAA, the question whether an arbitration contract exists is generally governed by state law. *First Options of Chicago, Inc. v. Kaplan*, __ U.S. __, 115 S. Ct. 1920, 1924, 131 L. Ed. 2d 485 (1995).

The Michigan Supreme Court, in refusing to order a claim to arbitration where the parties did not have an arbitration contract, furthered the policies of the FAA. There is no conflict with the FAA, and there can be no preemption.

CONCLUSION

For the foregoing reasons, Respondent requests that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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APPENDIX A — EXCERPTS FROM EMPLOYEE HANDBOOK

INTRODUCTION

This document is intended to establish and clarify certain employment policies, practices, rules and regulations (hereinafter collectively referred to as "Policies") of RELIABLE BUSINESS COMPUTER, INC., (hereinafter referred to as the "COMPANY"). Except as may otherwise be provided, the Policies will apply to all COMPANY employees, and it is each employee's responsibility to assure that his/her own conduct is in conformity with those Policies. It is important to recognize and clarify that the Policies specified herein do not create any employment or personal contract, express or implied, nor is it intended nor expected that the information provided in this document will provide sufficient detail to answer any and all questions which may arise. *NOTWITHSTANDING ANY OF THE SPECIFIC POLICIES HEREIN, EACH EMPLOYEE HAS THE ABSOLUTE RIGHT TO TERMINATE HIS/HER OWN EMPLOYMENT AT ANY TIME, WITHOUT NOTICE, AND FOR ANY REASON WHATSOEVER, AND THE COMPANY HAS THE SAME RIGHT.*

From time to time, the COMPANY specifically reserves the right, and may make modifications to any or all of the Policies herein, at its sole discretion, and as future conditions may warrant. In the event employees have any questions relative to any of the Policies, they are urged to contact their supervisor for clarification purposes.

* * *

The Policies set forth in this handbook are currently in effect and apply to all Full Time, Part Time and Temporary employees, except as may be specifically provided. Additional policies, practices, rules and regulations applicable to specified employees only, may be more restrictive than the Policies set forth herein.

Appendix A

Interpretations of the Policies and exceptions, if any, shall only be made in writing by the Executive Committee or such other employees as may be specifically designated by management. Accordingly, no individual employee has authority to make representations, promises or statements contrary to or different from the provisions herein, except the President, and only in a duly executed written document.

All current COMPANY employees will receive a copy of this document. New employees will receive a copy of this document at the time of formal hire. Upon receipt, all employees will sign the Employee Acknowledgement, acknowledging receipt of this document.

* * *

VII.

TERMINATION AND DISMISSAL

GENERAL

As indicated earlier, an employee's employment and compensation may be terminated with or without cause, with or without advance notice at any time, at the option of either the employee or the COMPANY. No employees of the COMPANY except the President, in a duly executed written document, has any authority to enter into any agreement for employment for any specified period of time, or to make any arrangement with employee contrary to, or different from the provisions set forth in this handbook. None of the policies, practices, procedures, or other matters set forth herein create any employment or personal contract, express or implied.

APPENDIX B — AFFIDAVIT OF CHRISTOPHER R. HOLLIDAY

IN THE SUPREME COURT

Appeal from the Court of Appeals

Docket No. 102109
Court of Appeals No. 152041
Lower Court No. 91 131 165 CZ

THERESA A. HEURTEBISE,

Plaintiff-Appellant,

vs.

RELIABLE BUSINESS COMPUTERS INC., A Michigan Corporation,

Defendant/Appellee.

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Appendix B

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(313) 963-8989

AFFIDAVIT OF CHRISTOPHER R. HOLLIDAY

STATE OF MICHIGAN)
COUNTY OF WAYNE) SS

CHRISTOPHER R. HOLLIDAY, being first duly sworn, deposes and says as follows:

1. I am an attorney of record for the Plaintiff in the above-captioned lawsuit.

2. Plaintiff commenced her lawsuit on November 25, 1991.

3. On December 13, 1991, Plaintiff, through her then-counsel, Niels Eric Hanson, served a request for production of documents on Defendant, which requested, among other items:

> 8. Any and all company handbooks, policy and procedure manuals, rules, and any other documents relating to Reliable's procedures and standards for discipline, layoff and termination, including, but not limited to, manuals available to employees and also those available only to supervisory and/or management personnel.

Appendix B

9. Copies of all personnel policies and policy manuals, for Reliable's managers and employees:

(a) Currently in effect; and

(b) Which were in effect between May, 1989 and July, 1990.

Exhibit A, p.6.

4. On December 19, 1991, Defendant moved to compel arbitration of Plaintiff's civil rights claim, based upon language in Defendant's Employee Handbook.

5. Defendant did not provide its entire Employee Handbook in support of its motion. Importantly, Defendant omitted the first page of the handbook, which page makes clear that nothing in the handbook, including the arbitration provision, is a contract.

6. I assumed representation of the Plaintiff in this matter in March 1992, after Plaintiff's previous attorney withdrew due to a conflict of interest.

7. Defendant's Motion to Dismiss or Alternatively to Compel Arbitration was argued before the Court, Judge Cynthia Stephens presiding, on April 10, 1992.

8. Defendant's Motion was denied.

9. Defendant sought interlocutory leave to appeal on May 6, 1992.

10. In September 1992, I twice asked Defendant, through its counsel, to provide the previously requested discovery, which included Defendant's Employee Handbook. **Exhibit B; Exhibit C.**

11. Despite a promise to provide the requested discovery, Defendant failed to do so.

12. Defendant has never produced its complete Employee Handbook, and has only provided the last eight pages of the handbook, and an Employee Acknowledgement form.

13. My client, Theresa Heurtebise, misplaced her copy of the employee handbook, and has been unable to locate it throughout this litigation.

14. On March 20, 1996, my associate, Julia Sherwin, obtained a copy of Defendant's Employee Handbook from a former employee of Reliable Business Computers, Inc., who also said that the handbook had been involved in a lawsuit in Wayne County Circuit Court in which he was also involved. Ms. Sherwin searched the court records and obtained a certified copy of the Second Amended Complaint in that case. A complete copy of the handbook was attached to that Complaint. The Complaint with handbooks is attached to Plaintiff-Appellant's Motion to Amend Record as **Exhibit D.**

15. A copy of that Handbook has been incorporated in Plaintiff-Appellant's Supplementary Appendix. The text at p. 2 of that Handbook shows clearly that this document is directly and materially relevant to Defendant's claims in this matter and should have been made a part of this record.

Appendix B

16. The matters set forth in this Affidavit are based on my own personal knowledge and if called upon to testify concerning them, I am both competent and willing to do so.

Further, Affiant sayeth not.

s/ CHRISTOPHER R. HOLLIDAY

Subscribed and sworn to before
me this 29th day of March, 1996.

s/ CAROL J. MORIN
Notary Public, Wayne County, MI
My Commission Expires: 9/23/00

Appendix B

STATE OF MICHIGAN

IN THE SUPREME COURT

Appeal from the Court of Appeals

Docket No. 102109
Court of Appeals No. 152041
Lower Court No. 91 131 165 CZ

THERESA A. HEURTEBISE,

Plaintiff-Appellant,

vs.

RELIABLE BUSINESS COMPUTERS INC., A Michigan Corporation,

Defendant-Appellee.

CHRISTOPHER R. HOLLIDAY (P-39173)
JULIA SHERWIN (P-50992)
Attorneys for Plaintiff-Appellant
3000 Cadillac Tower
Detroit, Michigan 48226
(313) 965-0050

ALAN M. KANTER (P-30221)
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Bloomfield Hills, Michigan 48302
(810) 644-2800

Appendix B

JOHNATHAN T. WALTON (P-32969)
Co-Counsel for Def.-Appellee
1515 Penobscott Building
Detroit, Michigan 48226
(313) 963-8989

PROOF OF SERVICE

STATE OF MICHIGAN)
COUNTY OF WAYNE) SS

LINDA S. HALLER, being first duly sworn, deposes and states that she is employed by the Law Firm of GOODMAN, EDEN, MILLENDER & BEDROSIAN, and during the course of said employment, she served a copy of **AFFIDAVIT OF CHRISTOPHER R. HOLLIDAY** upon:

MICHAEL L. GELLER
4109 Telegraph Road
Suite 3000
Bloomfield Hills, MI 48302

JONATHAN T. WALTON
1515 Penobscot Bldg.
Detroit, MI 48226

by placing same in an envelope addressed to the above individuals, bearing a return address and sufficient pre-paid postage thereon and by depositing same in the United States mail on April 1, 1996.

s/ LINDA S. HALLER

Subscribed and sworn to before
me this 1st day of April, 1996.

s/ CAROL J. MORIN
Notary Public, Wayne County, MI
My Commission Expires: 9/23/00